LAW OF BANKING

# LAW OF BANKING

BY

LORD CHORLEY, M.A.

OF THE INNER TEMPLE, BARRISTER-AT-LAW

SIR ERNEST CASSEL PROFESSOR OF COMMERCIAL LAW IN THE UNIVERSITY OF LONDON. GILBART LECTURER, 19[illegible]8-9

*SECOND EDITION*

LONDON
SIR ISAAC PITMAN & SONS, LTD.
1947

*First Edition, 1938*
*Second Edition, 1946*

SIR ISAAC PITMAN & SONS, Ltd.
PITMAN HOUSE, PARKER STREET, KINGSWAY, LONDON, W.C.2
THE PITMAN PRESS, BATH
PITMAN HOUSE, LITTLE COLLINS STREET, MELBOURNE
UNITEERS BUILDING, RIVER VALLEY ROAD, SINGAPORE
27 BECKETTS BUILDINGS, PRESIDENT STREET, JOHANNESBURG

ASSOCIATED COMPANIES
PITMAN PUBLISHING CORPORATION
2 WEST 45TH STREET, NEW YORK
205 WEST MONROE STREET, CHICAGO
SIR ISAAC PITMAN & SONS (CANADA), Ltd.
(INCORPORATING THE COMMERCIAL TEXT BOOK COMPANY)
PITMAN HOUSE, 381-383 CHURCH STREET, TORONTO

BOOK
PRODUCTION
WAR ECONOMY
STANDARD

THE PAPER AND BINDING OF
THIS BOOK CONFORM TO THE
AUTHORIZED ECONOMY STANDARDS

MADE IN GREAT BRITAIN AT THE PITMAN PRESS, BATH
D7—(L.2445)

# PREFACE
## TO THE SECOND EDITION

THE first edition of this book received a very gratifying welcome, and few criticisms of substance were noticed. In preparing a second edition I have not, therefore, made any substantial alterations.

Since 1937 there have been quite a number of interesting and important cases, and a few doubtful points have been settled. I have endeavoured to refer to all these either in the text or notes. Purely war-time changes in the law, however, I have avoided noting. Though in many cases of great economic importance, e.g. the exchange regulations, it is hoped that they will be ephemeral, and in any case the situation fluctuates too rapidly to make it desirable to set them out in an elementary textbook.

I have taken the opportunity to correct some errors, and to clarify certain passages in the text.

CHORLEY.

# PREFACE
## TO THE FIRST EDITION

THE appearance of yet another textbook on the law of banking calls perhaps for some explanation. Several years' experience of teaching the subject has satisfied me that the existing textbooks, excellent as several of them are, do not quite meet the need of the many students whose legal equipment is small. The standard practitioners' textbooks naturally assume a complete grounding in the general principles of law which makes them too difficult for the average non-legal student. This, too, is sometimes the case with textbooks purporting to be written specially for bank officers, and these, even when they avoid that error, usually go into such detail, especially in regard to many matters such as securities for advances, which do not normally come into the experience of junior bank officers, that they frequently prove confusing to the beginner. This volume is intended for those who are at the outset of their studies of the subject and have had but little, if any, practical experience of the work of banks. It also has in mind those whose life-work is intended to be banking, rather than those who intend to pursue a professional legal career, though in the absence of an elementary legal textbook on the subject it is hoped that it may prove of value to the latter also.

I have attempted to give a sufficient introduction to enable students to obtain an adequate grasp of the main principles of the law of banking, together with a sufficiency of detail to relate these principles to the everyday business of banking. For example, in those matters which are particularly the concern of the average bank officer, such as the law of cheques, I have ventured on a more detailed exposition than in the case of those branches of the law where the transactions are handled by lawyers or officers with

specialized knowledge, such as securities for advances, a topic already mentioned: here a firm grasp of general principles should be a sufficient equipment.

I have used, and I am indebted to the authors of most of the leading textbooks and in particular the work of Sir John Paget, whose stimulating example of readiness to discuss problems still unsettled and to criticise decisions already given I have endeavoured to follow, if with less likelihood of success. I must also mention my indebtedness to Dr. Hart's important and supremely lucid contribution to the law on this subject.

The practical illustrations and precedents have been chosen with a view to helping those students who are unacquainted with the business aspects of the matters exemplified and I hope they will prove useful.

Finally I must express my gratitude to Mr. R. W. Jones of the Westminster Bank who read the whole volume in manuscript and placed his rich stores both of legal wisdom and practical knowledge at my disposal; to my colleague Professor D. Hughes Parry who read the chapter on mortgages and gave me much useful advice; and to my former pupil Dr. O. Giles who has assisted me with the proofs and index and made a number of valuable suggestions.

R. S. T. CHORLEY

# CONTENTS



## APPENDICES

# TABLE OF CASES

*References to pages on which some account of the facts of a case is given are printed in heavy type.*

# TABLE OF STATUTES

# TABLE OF ABBREVIATIONS OF THE REPORTS CITED

| | | |
|---|---|---|
| A. & E. | Adolphus and Ellis | 1834–42 |
| A.C. [preceded by date] | Law Reports, Appeal Cases, House of Lords | 1891–current |
| All E.R. | All England Reports | 1936–current |
| App. Cas. | Law Reports, Appeal Cases, House of Lords | 1875–90 |
| B. & Ad. | Barnewall and Adolphus | 1830–34 |
| B. & Ald. | Barnewall and Alderson | 1817–22 |
| B. & C. | Barnewall and Cresswell | 1822–30 |
| Bing. | Bingham | 1822–34 |
| Bing. N.C. | Bingham's New Cases | 1834–40 |
| C. & P. | Carrington and Paine | 1823–41 |
| C.B. | Common Bench Reports | 1845–56 |
| C.B.N.S. | Common Bench Reports, New Series | 1856–65 |
| Ch. App. | Law Reports, Chancery Appeals | 1865–75 |
| Ch.D. | Law Reports, Chancery Division | 1875–90 |
| Cl. & F. | Clark and Finnelly | 1831–56 |
| Com. Cas. | Commercial Cases | 1895–current |
| De G. M. & G. | De Gex, Macnaghten and Gordon | 1851–57 |
| Drew. | Drewry | 1852–59 |
| E. & B. | Ellis and Blackburn | 1852–58 |
| E. & E. | Ellis and Ellis | 1858–61 |
| Esp. | Espinasse | 1793–1810 |
| Ex. | Exchequer Reports (Welsby, Hurlstone and Gordon) | 1847–56 |
| H. & C. | Hurlstone and Coltman | 1862–66 |
| H. L. C. | Clark's Reports, House of Lords | 1847–66 |
| Hare. | Hare | 1841–53 |
| Ir.C.L.R. | Irish Common Law Reports | 1849–66 |
| I.R. [preceded by date] | Irish Reports | 1894–current |
| Ir. Eq. R. | Irish Equity Reports | 1838–51 |
| K. & J. | Kay and Johnson | 1854–58 |
| K.B. [preceded by date] | Law Reports, King's Bench Division | 1901–current |
| L.J. Ch. | Law Journal, Chancery | 1831–current |
| L.J.K.B. or Q.B. | Law Journal, King's Bench | 1831–current |
| Ll.L.R. | Lloyd's List Law Reports | 1919–current |
| L.T. | Law Times Reports | 1859–current |
| M. & G. | Manning and Grainger | 1840–45 |
| M. & W. | Meeson and Welsby | 1836–47 |
| Mer. | Merivale | 1815–17 |
| Moo. P.C. | Moore's Privy Council Cases | 1836–63 |
| Moore, C.P. | J. B. Moore's Common Pleas Reports | 1817–27 |
| Q.B. [preceded by date] | Law Reports, Queen's Bench Division | 1891–1901 |
| Q.B.D. | Law Reports, Queen's Bench Division | 1875–90 |
| Russ. & Ry. | Russel and Ryan | 1800–23 |
| S. J. | Solicitor's Journal | 1856–current |
| T.L.R. | The Times Law Reports | 1884–current |
| T.R. | Term Reports | 1785–1800 |
| Ves. | Vesey Junior's Reports | 1789–1817 |
| W.N. [preceded by date] | Law Reports, Weekly Notes | 1866–current |

# LAW REPORTS

| | | |
|---|---|---|
| L.R.C.C.R. | Crown Cases Reserved | 1865–75 |
| L.R. Eq. | Equity | |
| L.R. Ex. | Exchequer | |
| L.R.H.L. | House of Lords | |
| L.R.Q.B. | Queen's Bench | |
| L.R.P.C. | Privy Council | |
| Ch. App. | Chancery Appeals | |
| Ch.D. | Chancery Division | 1875–90 |
| Q.B.D. | Queen's Bench Division | |
| App. Cas. | House of Lords | |
| A.C. [preceded by date] | House of Lords | 1891–current |
| Ch. [preceded by date] | Chancery Division | |
| P. [preceded by date] | Probate Division | |
| Q.B. or K.B. [preceded by date] | Queen's Bench Division or King's Bench Division | |

# LAW OF BANKING

## CHAPTER I

## INTRODUCTION—BANKS AND BANKING BUSINESS

BANKS are of two main types, Savings Banks and Commercial Banks.[1] Savings banks, as their name suggests, are intended to give citizens a secure institution with which they may safely deposit their savings at a small rate of interest. Abuses in connection with such banks, which were at one time a public scandal, led to the intervention of Parliament, and the establishment of the principle that those responsible for the conduct of this type of bank must assume the position of trustees, and be subjected to public control. Hence these banks are called Trustee Savings Banks, and must be conducted in obedience to a large number of regulations, and under the supervision of State officials.[2] The well-known Post Office Savings Bank is in essence an institution of this type, actually administered by a government department, and the conduct of its business is similarly regulated by statute.[3] A good deal of savings business formerly done by the Commercial Banks is now being done by the Savings Banks. **Savings banks**

This type of business, however, though of considerable volume and importance, is of a specialised administrative character, is only indirectly connected with the business of banking as it is ordinarily understood, and will not be further dealt with in the present volume, which is devoted to the law of commercial banking.

[1] Other divisions are, of course, possible: e.g. Banks of Deposit and Banks of Issue.

[2] See the Trustee Savings Banks Act, 1863 (26 & 27 Vict., c. 87), and the Savings Banks Act, 1929 (19 & 20 Geo. V, c. 27).

[3] See Post Office Savings Bank Act, 1861 (24 & 25 Vict., c 14).

Commercial banks

Commercial banks may be divided into banks of deposit and merchant banks. The object of a bank of deposit, of which the well-known joint-stock banks called the "big five" are examples, is to collect large aggregations or deposits of money by borrowing from the mercantile and general community, and to lend it out again at interest for short periods to those requiring money for the finance of their businesses, whether in commerce, industry, or agriculture. The merchant banker, on the other hand, uses his own and borrowed money for the purposes of financing business of a type with which he makes himself especially familiar, such as overseas commerce, loans to foreign municipalities, the issue of industrial securities, etc. The business of the merchant banker merges into that of the issue houses, and indeed it is hardly possible to give an exclusive description of it. It overlaps to some extent with that of the deposit banks, but they may be distinguished in that the merchant banks do not open accounts for any member of the public who chooses to apply, and do not ordinarily issue cheque books to their customers. It is with the legal aspects of the business of the deposit banks that this volume is concerned, though something of what we have to say will apply also to the merchant banks in so far as they are concerned with the same type of business.

Deposit banks

Merchant bankers

Banks of issue

Formerly deposit banks were contrasted with banks of issue, i.e. banks which issued bank-notes, promissory notes payable to bearer on demand.

The Bank of England

At the present time, however, the Bank of England is the only bank in England which can legally issue such bank notes, and its notes are legal tender. The issue of such notes by the Bank of England is closely regulated by a series of statutes, of which the most important are the Bank Charter Act, 1844,[1] and the Currency and Bank Notes Act, 1928,[2] under the latter of which the present-day paper currency is issued. This note issue is of vital importance from the point

[1] 7 & 8 Vict., c. 32.
[2] 18 & 19 Geo. V, c. 13.

of view of economics, and indeed of constitutional law, and the monetary organisation of the country depends on these statutes. They only indirectly affect the ordinary business of commercial banking, and we do not accordingly propose to examine them further here.

A person who carries on the business of banking is called a banker, and his business premises his bank. With the advent of the limited liability company, however, the term "bank" has come to be used to describe a company which carries on a banking business, and the terms "banker" and "bank" have become in practice interchangeable, and it would perhaps be regarded as pedantic to insist on keeping the separate meanings. Incidentally the growth of joint-stock company banking led to the imposition of various formalities as regards the making of returns, etc., to the public authorities (as to which, see Chapter II).

Banking companies

The major business of the deposit banker, as we have seen, is to borrow money and lend it again at interest. He borrows it on terms that he must repay it on demand (current account), or at any rate upon short notice (deposit account) (see Chapter VIII). The lender (who is called the *customer*) makes his demand for repayment in the case of a current account by *drawing a cheque* upon the banker. The result of this has been the growth of the cheque system, which has now become one of the vital wheels in the machinery of business. Frequently the customer will require repayment to be made not to himself but to a third party. The legal aspects of this business of repayment are important and difficult, largely owing to risks of forgery. The duties of the banker towards his customer and of the customer towards his banker, therefore, require very careful discussion (see Chapter V). Moreover, the customer frequently pays money into his account in the form of cheques of which he is the holder, leaving his own banker to obtain the amounts thereof from the banker on whom they are drawn. The business involved in such collection is enormous, and the legal difficulties involved considerable owing to the risk

Borrower and lender

Relationship of banker and customer

that the customer may have no title or a defective title (see Chapter VI).

Cheques and negotiable instruments

For those engaged in the everyday business of banking, therefore, the law as to cheques, and particularly in relation to the payment and collection thereof is of very great importance, and will receive particular attention in this volume (Chapters IV, V, and VI). At the same time it must be remembered that a cheque is only a particular type of bill of exchange, so that an adequate knowledge of the law of bills is necessary to the proper understanding of the law of cheques. Bankers, moreover, in effect lend money by discounting bills and other types of negotiable securities. The law of negotiable instruments, although, as will be realised from the foregoing, it overlaps considerably with banking, is in reality a separate subject adequately dealt with in numerous textbooks, and it is not proposed to take up space in these pages by an attempt to summarise it. It will indeed be assumed that the reader already has a competent knowledge of the general law of bills and notes, though the subject of cheques will naturally receive a full discussion.

The account

The customer has, of course, an account with his banker, and this is kept in modern times by one party to the transaction, viz. the banker, in his ledgers. It has, however, for well over a century been the usage for the banker to furnish a copy of this account to the customer by means of a *pass book,* though this is now being displaced by loose-leaf statements of account. Difficult questions naturally arise from time to time in connection with this system of accounting, and these it behoves the banker to avoid if possible (Chapter VIII).

Types of customer

From the legal point of view the bankers' customers include *various special types.* The law, as stated in these pages, relates to normal adult customers, and requires qualification from time to time in relation to such special customers. It will therefore be necessary to examine the more important of such qualifications. The legal position of *infants,* for example, is continually

a matter of difficulty in business, and not least in connection with their banking accounts. Moreover there has for many years been a tendency for individuals to drop out of commerce in its larger aspects, and for their place to be taken by aggregations whether in the form of *firms* of partners or of *limited companies*. Such aggregations perforce function through agents or officers, and bankers must, therefore, be acquainted with the legal requirements in respect of the use of such delegated authority. On the opening of an account, therefore, it is necessary for those responsible at the bank to consider various matters of this kind, and to bear them closely in mind while the account is being operated (Chapter IX).

**Services rendered by bankers**

A banker is conveniently situated for rendering *various services* to his customer, and being anxious to secure and retain as much custom as possible, he naturally affords these services when asked to do so. In the first place, having strong rooms he is able from time to time to accept the *safe custody* of his customers' valuables, and must accordingly face the legal question of responsibility for loss or damage (Chapter X). Then he is in a good position to give an opinion as to his customer's financial standing, and the latter may consequently make use of him as a referee or *reference* (to use the common if inaccurate expression) for the purpose of satisfying those with whom he is desirous of entering upon business relationship. It is obvious that statements by the banker which may involve disclosures as to the state of the customer's account will sometimes involve nice points as to the duties of the banker both to the customer about whom they are made, and to the third party to whom they are communicated (Chapter X). Again, since the successful prosecution of his business requires skill in financial matters, the banker is likely from time to time to receive requests from his customers for advice as to the making of *investments*. He will perhaps accede to such requests and must then face the question of responsibility for the soundness of the advice given

(Chapter X). Further, of recent years, banks have been developing a considerable business by acting as paid *executors and trustees.* The efficient conduct of such business clearly requires a close knowledge of a complicated branch of the law, and the whole of the legal side of such business is sometimes (and should be) entrusted to qualified professional men in the legal department of the bank, and is not a subject which can adequately be dealt with here. Another service constantly required by customers is the provision of *foreign currencies*, more particularly from time to time when travelling abroad. Special machinery has long since been established for this purpose in the *letter of credit* and the *circular note*, modified forms of which have more recently been made the basis on which the largest part of overseas commerce is financed. All these and other services rendered by the banks to their customers are, of course, *subsidiary* to the main business of banking, and it may often be no easy matter to ascertain the precise degree of legal responsibility which the banker takes upon himself in such cases (Chapter X).

The banker as a *lender of money* introduces us to a different set and type of problems. In the first place the advances will usually be made to the banker's own customers. The methods of making such advances are naturally various. The most obvious is that of the *overdraft* or loan. Alternatively the bank may accept bills of exchange drawn by the customer or for his account, a common method of providing short term finance in connection with the merchanting of goods.

**Advances and security therefor**

But whatever be the way of making the advances, the banker must protect himself against the possible failure of his customer to repay the amount of the loan in due course; in other words he must have *securities* which he can realise in the event of default. From a business point of view the character, position, and reputation of the customer may afford ample security. The ability to estimate such imponderables has always been regarded as an essential quality in a good banker,

but with the increasing size of the banks involving a reluctance to delegate discretionary authority on the one hand, and a similar growth in size of business units involving much larger loan accounts on the other, it has become more and more necessary to insist on tangible securities. To estimate the value of most of these, legal knowledge is necessary, and in many cases the necessary process of putting the banker in a position to avail himself of them involves legal machinery of greater or less complexity. The most obvious method of providing security is for the customer to give the banker some sort of control over his property. But property is of various types, and each type may need to be dealt with somewhat differently from the others. *Land* and *houses* can be made available by *mortgage* and *charge* (Chapter XI), and *personal property* by *pledge* and *lien* (Chapter XI), or in some cases by *assignment* as in the case of policies of *life assurance* (Chapter XI). Again the security of a third person may be called in to reinforce that of the customer, an object which can be achieved by a *contract of guarantee* (Chapter XI).

In some cases it may not be convenient to make use of any of these methods. For example, when the banker finances the wholesale purchase of goods, it is usually most convenient to make the goods themselves the security for the advance. This can be done by the *pledge*, not of the goods themselves but of the *documents of title*, while the necessary commercial flexibility can be obtained by the bank releasing the goods as and when subsales are made in return for reimbursement of a proportionate amount of the advance. In order that the customer may be in a position to effect subsales, however, it may be necessary to entrust him with possession of the goods as a *trustee*, so to speak, for the bank. It is obvious that the legal basis of such a transaction, which is one of the most important and typical in modern commerce, is somewhat complicated, yet the banker may well have to conduct it without legal advice, so that a grasp of the law as to *documentary*

*credits* and its corollaries will stand him in good stead (Chapter XI).

Finally legal problems arise from the organisation of the business of banking (Chapter XIII) and in connection with the employment of staff by the bank, more particularly in regard to the scope of their authority (Chapter XIV), which may from time to time demand attention.

**Termination of relationship**

It will be evident from the foregoing that the relationship of banker and customer, while it is in being, gives rise to many legal problems. But even its termination may cause difficulty. Should the *customer die*, or become a *lunatic*, or particularly if he be made *bankrupt*, the banker must walk warily, and even so may find himself in difficulties (Chapter XIV).

**Third parties**

Finally, the banker may find himself faced with *demands by third parties* whether for money claimed from the customer's balance, or for information in relation to the customer's affairs, possibly in connection with an action at law. He must think twice before acceding to such demands for if he does so wrongly he will have to compensate his customer. If, however, the balance of the account has been *assigned* by the customer, or attached by due process of law (*garnishee proceedings*) the banker will not only be justified in making payment to the third party, but will be under the obligation to do so. Again, by appropriate process under the Bankers' Books Evidence Act, 1879[1] he may be required to give evidence as to the customer's account. These matters are dealt with in their appropriate chapters.

Such in outline are the topics which are discussed in the following pages. Enough has been said, however, to indicate that a great deal of the law of banking is concerned with principles and rules which are of general application. These are dealt with in appropriate detail in specialist textbooks, and the object in this volume has been simply to describe them in outline, giving some detail from time to time when an application

[1] 42 and 43 Vict., c.11

particularly important to the law of banking is in question. The serious student of the subject, however, will need to pursue his studies over a considerable field of English law, and must come to his task with a good grasp of the elementary principles of the general law, and more particularly of the law of contract and mercantile law. Without such an equipment the reader of this volume will soon find himself in difficulties and his studies of less profit to him than they ought to be.

## CHAPTER II

# STATUTES AFFECTING BANKERS

In this chapter the principal statutes directly affecting the business of banking are considered. There are, of course, many statutes of general application which are of very great importance to bankers. These are referred to from time to time in other chapters. Here we are principally concerned with a number of acts of Parliament which must be borne in mind in connection with the machinery of banking business. The various statutes relating to the Bank of England, and the savings banks, and other similar institutions have been referred to in Chapter I and are outside the scope of this book for the most part.

General banking is no longer carried on by individuals but by partnerships (some of the private banks) or by corporations (trading companies, including the "big five"). Most of the relevant statutes apply equally to both types.

Partnership banks

1. If the business of banking is carried on by a *partnership* the firm must not consist of more than ten members.[1] Such banking firms are subject to the general rules of partnership law, which must be consulted when necessary.[2]

Returns of all banking businesses

2. Unless the return mentioned in paragraph 3 below is made (this is done by most banking companies), every banker, whether firm or corporation, must make a return during the first fifteen days of January to the Commissioners of Stamps and Taxes, giving name, residence and occupation, the firm name under which the business is carried on, and all the addresses at which the business is conducted. The penalty for failure to observe this requirement is a fine of £50.[3]

3. Of banking corporations some are regulated under

[1] Companies Act, 1929, (19 & 20 Geo. V, c. 23), s. 358.
[2] See Partnership Act, 1890 (53 & 54 Vict., c. 39).
[3] Bank Charter Act, 1844, s. 21.

their charters of incorporation, as is (in certain respects) the Bank of England, and others under various statutes (e.g. the Bank Charter Act, 1844). For practical purposes, however, it is only necessary to consider the Companies Act, 1929, which governs the ordinary limited liability trading company. The general provisions of that statute are obviously too extensive to be considered here, but a few of its sections relate specifically to companies carrying on the business of banking and others need to be particularly borne in mind. By Sect. 358, if more than ten persons carry on a banking business in association they must form a company registered under the Companies Act unless they have obtained a charter or letters patent from the Crown. All companies registered under the Companies Act, 1929, are required by Sect. 108 of that Act to make an annual return to the Registrar of Companies in which must be given a considerable mass of detailed information as set out in the section. This return must include a certified copy of the last Balance Sheet.[1] Banking companies which have made such a return and added to it a list of the various addresses at which the business is carried on are excused from making returns under the earlier statutes such as the Bank Charter Act, 1844 (see (2) *supra*), and are in addition entitled to the advantages conferred by the Bankers' Books Evidence Act, 1879 (see below).[2]

Returns of company banks

These returns are intended as a safeguard to the public doing business with the concerns in question inasmuch as they require the disclosure of a considerable amount of information as to the membership, directorate, capital, and trading position of the company. Institutions such as Trustee Savings Banks, which are governed by special statutes and are subjected to even stricter requirements, do not need to make the returns just mentioned.

Certain limited companies, including banking companies, must, before commencing business and while

[1] Companies Act, 1929, s. 110 (3).
[2] Companies Act, 1929, s. 361, and see page 12, *post*.

engaged in business, on the first Monday in February and the first Tuesday in August, make a statement giving particulars as to their capital, how much of it has been called up, and as to their liabilities and assets in the form set out in the seventh schedule of the Companies Act, 1929, and put it up in their registered offices, and in any place where they carry on business.[1]

Registration of business names

4. In the case of partnership banks, the necessity for registering under the Registration of Business Names Act, 1916[2] must be remembered. This statute requires the registration of all firms where the firm name does not consist of the true surnames of all the partners or where any member has changed his name.[3] Individuals and firms requiring to be registered under this Act must publish their names, and (if not British) their nationalities on their notepaper, circulars, etc.[4]

Bills of Exchange Acts

5. The Bills of Exchange Act, 1882,[5] and the various other statutes relating to negotiable instruments, affect the business of banking very closely, and will be frequently referred to in the following chapters.

Bankruptcy Acts

6. The Bankruptcy Act, 1914[6] and the Bankruptcy (Amendment) Act, 1926,[7] contains provisions of great importance to bankers. The subject of bankruptcy in relation to banking is dealt with in Chapter XII.

Banker's Books Evidence Act

7. The Bankers' Books Evidence Act, 1879,[8] confers valuable privileges upon bankers in connection with legal proceedings. A banker's ledgers and other books showing the various items of his customers' accounts may be, and often are, valuable evidence in litigation. According to the Law of Evidence a book of account can only be given in evidence to refresh his memory by the clerk or other person responsible for keeping it: moreover the original document must be put in, copies not being regarded as evidence. These rules worked great hardship on bankers owing to the vast number of accounts which their business necessitates: responsible clerks were kept away from their work for days

[1] Companies Act, 1929, s. 131.
[2] 6 & 7 Geo. V, c. 58.
[3] *Ibid.*, s. 1.
[4] *Ibid.*, s. 18.
[5] 45 & 46 Vict., c. 61.
[6] 4 & 5 Geo. V., c. 59.
[7] 16 & 17 Geo. V., c. 7.
[8] 42 Vict., c. 11.

at a time, and the ledgers were removed from their premises for similar periods.

The Bankers' Books Evidence Act, 1879, was passed to remove these difficulties.

(*a*) Entries in bankers' books, i.e. books used in the ordinary business of a bank, such as ledgers, day books, and account books, are, under the Act, *prima facie* evidence of the matters recorded therein.[1] This means that it is no longer necessary for the clerk who was responsible for keeping the account to attend the Court, except in the unusual event of the accuracy of the figures being challenged.

(*b*) The entries in the books may be proved by means of copies provided that a partner or officer of the bank swears in Court or in an affidavit to the following effect: (i) that the book from which the copy was made was, at the time of making, one of the ordinary books of the bank; (ii) that the entries were made in the ordinary course of the business of the bank; (iii) that the book in question is in the custody or control of the bank;[2] (iv) that he has examined the copy with the original entry and it is correct;[3]

Condition (iv) may be proved by any person, but it is usual for an officer of the bank to prove all four points in an affidavit.

The following further matters are of importance—

(*c*) If the actual presence of a bank official or the production of the books in Court is required, the order of a judge, made for special cause, is necessary.[4]

(*d*) It is important to a litigant to know whether the entries in the bank books are relevant to his case. He is entitled to apply to the Court for an order permitting him to inspect and take copies of any entries in the bank books. This order may be obtained without summoning the bank or other party before the Court, but the order when made must be served on the bank three days before it is proposed to make the inspection.[5]

[1] Bankers' Books Evidence Act, 1879. s. 3
[2] *Ibid.*, s. 4.
[3] *Ibid.*, s. 5.
[4] *Ibid.*, s. 6.
[5] *Ibid.*, s. 7.

Although the terms of the section are wide enough to permit an order for the inspection of any person's account, the Court will only make an order when the account is "in form or in substance the account of a party to the litigation."[1] But this is wide enough to enable a magistrate to make an order permitting the prosecution to inspect the defendant's banking account in connection with criminal proceedings.[2]

(*e*) If the bank itself be a party to the litigation the Act does not apply, and its books will have to be disclosed under the ordinary rules relating to the discovery of documents.

(*f*) The words of Sect. 3 of the Act are sufficiently wide to make the copies of the bank's books admissible against anyone, e.g. to make the defendant's account admissible against the plaintiff, and vice versa. There is some doubt whether this is the correct interpretation, however.[3]

(*g*) The privilege of taking advantage of the Act is confined to banks which have made returns either under the Bank Charter Act or Sect. 108 of the Companies Act, 1929, as already discussed.

1 *Per* Lindley, M.R., in *Pollock* v. *Garle*, [1898] 1 Ch. 1, at p. 5.
2 *R.* v. *Kinghorn*, [1908] 2 K.B. 949.
3 See the cases referred to in Hart, *Law of Banking*, 4th Ed., p. 284.

# CHAPTER III

## THE RELATIONSHIP OF BANKER AND CUSTOMER

THE legal basis of the relationship between banker and customer is of great theoretical, and considerable practical, importance. Some understanding of this matter is necessary before it is possible to appreciate the precise significance of the two words "banker" and "customer," for definitions of these terms are conditioned by the character of the relationship existing between these parties, and are necessary in connection with the various statutory requirements and protections which exist by virtue of a number of Acts of Parliament.[1]

Definition of banker

No completely satisfactory definition of the term "banker" has yet been enunciated. The business of banking is very diverse in its character, and, as has been shown in Chapter I, very differing activities are commonly included under the one description. The statutes even, which are concerned with bankers, are concerned with them for widely differing purposes, and it may well be that a definition which would be satisfactory in connection with one statute would be misleading for the purposes of another. Here we are concerned with defining the commercial deposit banker, in our time typified by any one of the "big five" banks.

Origin of banking in England

Modern banking of this type is usually said to have originated during the Parliamentary wars of the seventeenth century.[2] During that troubled period, people had recourse to the goldsmiths as depositories

[1] See Chapters V and VI, *post*.

[2] Banking, of course, had existed from the early middle ages, particularly on the continent. In many respects, such as in connection with dealings in the exchange of foreign currencies, it was very specialised. The investment of money for clients was undertaken by the scriveners. Nevertheless the deposit of funds by members of the community at large with a banker to be used at his discretion for commercial and industrial purposes appears to be a more modern invention.

for their money and valuables. In the more settled times which followed, the depositors still found it convenient to keep their money with the goldsmiths, who were prepared to allow them interest upon it, upon the terms that it should be returned as and when required. The goldsmiths were only too glad to receive it for they had discovered that the number of demands for repayment at any one time was unlikely to amount to more than a fraction of the whole amount deposited with them, and that in the meanwhile it could be profitably used for making loans to needy monarchs and noblemen, or to finance ventures in commerce and industry. It remained to define the legal character of this deposit of money with the goldsmiths, or bankers as they came eventually to be called.[1]

Bailments

Deposit of goods for safe custody is an example of an important type of contract or *quasi* contract called *bailment*, a term which signifies the delivery of goods by one person (the bailor) to another (the bailee) on the terms that in due course they are to be redelivered to the bailor or to his order. Money is not ordinarily the subject-matter of bailment, but may be so if the actual coins delivered are to be returned, e.g. when placed in a sealed bag or cashbox. The earliest deposits with the goldsmiths may have been of this nature, but when it became recognised that the goldsmith was to make use of the money it followed that the transaction could not be a bailment, for the actual coins deposited could never, humanly speaking, be returned. A bailment relationship would have nipped the incipient business of banking in the bud.

## A CONFIDENTIAL RELATIONSHIP

Agency, trusteeship, loan

There were three other possible relationships: (*a*) of principal and agent; (*b*) of trustee and beneficiary; (*c*) of debtor and creditor. The law has fluctuated a little between these three conceptions, and, although

[1] In the middle of the eighteenth century bankers were still called goldsmiths.

it finally adopted the last of them, the development has been somewhat coloured by the first, if not also by the second of them. To have held that the banker was a trustee of the moneys deposited with him would have killed the business of banking as we know it as effectively as to have held that he was a bailee. A trustee is usually severely restricted in the use to which he may put trust funds, and may be confined to investments in a limited class of securities; a banker could not have been a trustee, and retained complete freedom as to the use of the money in commerce.

An agent is in many respects in the position of a trustee. It is true that it would have been possible to treat the banker as an agent to use his principal's money at discretion, but the difficulties as to remuneration and accounting under agency law would have been a grave obstacle to the development of a flexible banking system. Yet this view of the position was strenuously argued for as late as 1848 in the famous case of *Foley* v. *Hill*.[1] On the other hand, the agent owes to his principal the duty of good faith, and confidence in relation to his transactions and their account, and it is highly desirable that a similar position should exist as between banker and customer.[2] The banker is indeed under "a contractual duty of secrecy implied in the relation of banker and customer . . . the confidential relationship between the parties is very marked"[3] in respect at any rate of "all the transactions that go through the account, and to the securities, if any, given in respect of the account.'"[4]

**ILLUSTRATION. TOURNIER *v.* NATIONAL PROVINCIAL BANK**[5]

The plaintiff banked with the defendants at their Moorgate Street branch. His account became overdrawn, and he agreed to pay off the overdraft by weekly instalments of £1. He gave his address as that of a firm whose employ-

(1848), 2 H.L.C. 28—see p. 21, *post*.
See *Tournier* v. *National Provincial Bank*, [1924] 1 K.B. 461.
*Loc. cit.* per Bankes, L.J., at p. 474.
*Loc. cit.* per Atkin, L.J., at p. 485.
*Supra*.

ment he was about to enter. He failed to pay the instalments, and the manager of the defendants' branch telephoned to his employers to ask for his private address. In the course of the conversation the manager informed the employers that the plaintiff's account was overdrawn, that he had failed to keep his promise to put it in funds, and that he was suspected of betting as cheques drawn by him had been paid to bookmakers. As a result, the plaintiff got into difficulties with his employers, and sued the defendants for damages.

*Held:* The defendants were liable as they had failed in their duty to the plaintiff to treat his account and affairs as confidential.

Apart from Tournier's case, there is little authority upon this subject and the precise limits of the duty have not been defined. The *obiter dicta* of Bankes and Atkin, L.JJ., in that case, however, would extend it further than it has been stated above. Bankes, L.J., extended it not only to information derived from the account "but from other sources,"[1] and Atkin, L.J., said, "I further think that the obligation extends to information obtained from other sources than the customer's actual account, if the occasion upon which the information was obtained arose out of the banking relations of the bank and its customers—for example, with a view to assisting the bank in conducting the customer's business, or in coming to decisions as to its treatment of its customers."[2] The duty does not terminate with the closing of the account any more than an agent's similar duty terminates with the cessation of his agency.

Exceptions to duty of secrecy

On the other hand, there are clearly exceptional cases where the duty cannot operate, the most obvious being when the bank has to issue a writ claiming repayment of an overdraft, thus publishing the state of the account. Bankes, L.J., attempted to summarise these exceptions in Tournier's case,[3] but his list is not necessarily exhaustive.

They are as follows—

(a) Compulsion of law

(*a*) Where there is compulsion of law. The most

[1] *Loc. cit.* at p. 473. [2] *Loc. cit.* at p. 485. [3] *Loc. cit.* at p. 473.

obvious example of this is when the bank has to give evidence in legal proceedings.[1] It is possible that another instance may occur in connection with the customer's income tax, though this is a difficult subject. The Income Tax Act, 1918, Sect. 103[2], requires persons in receipt of money arising from the sources mentioned in the Act belonging to any other person, who is chargeable in respect of it, to make a return of such money and give the name and address of the owner. It is clear that this may in some cases necessitate disclosures by banks as to their customers' affairs; e.g. (i) when the bank acts as trustee or executor, and receives interest or dividend in that capacity payable to customers; (ii) when it holds stock or shares of its customer as security and receives the interest or dividends, and credits them to his account; and (iii) when stock is held by a bank for a customer in its own name or in the name of its nominee, and the customer's account is credited with the interest or dividends.[3]

It is not clear whether this would apply to the common case where the customer gives general instructions for interest and dividends payable to him by companies in which he is interested to be sent directly to his bank for the credit of his account, but the words are sufficiently widely drafted to cover such a case. When this point is tested by the Inland Revenue authorities it may lead to the withdrawal of these facilities by the banks. At present, however, such returns are not called for, and unless they are called for they need not be made.

It is probable that without further legislation the tax authorities are not in a position to claim any general right of investigating bank accounts, except in cases where an offence is charged, and the bank is called to produce the accounts as evidence. The mere fact that the bank were asked for information by a police officer would not justify a disclosure. When, however,

[1] See Bankers' Books Evidence Act, 1879, in Chapter II above.
[2] 8 and 9 Geo. V c. 40
[3] See *A.-G.* v. *National Provincial Bank Ltd.* (1928), 44 T.L.R. 701.

a director or other officer of a company is prosecuted for frauds discovered during a winding-up, the company's banker is under the obligation to give such assistance "as he is reasonably able to give" to the prosecution, and this would presumably cover disclosure of the company's accounts.[1] The accounts would by that time be under the control of the liquidator, and the value of the provision would appear to lie in its enabling the liquidator to call upon the bank for further information required by the prosecution.

(b) Public interest

(*b*) The second exception mentioned by Bankes, L.J.,[2] is "where there is a duty to the public to disclose." An example of this would be when during time of war the customer's dealings indicated trading with the enemy.

(c) Required by interests of bank

(*c*) The case of a bank suing on an overdraft has been mentioned. It is an example of the third group, "where the interests of the bank require disclosure."

(d) Bankers' references

(*d*) Finally, "when the disclosure is made by the express or implied consent of the customer." The furnishing of what are called banker's references is an important service customarily rendered by bankers to customers who are in business: it is considered in Chapter X. It is not uncommon in practice for bankers to answer in confidence queries put to them by other bankers relating to their customers. This practice, however, appears to be unjustifiable according to the doctrine enunciated in *Tournier's Case.*

Another case which would appear to fall under this head is when a guarantor of an overdraft seeks information as to the extent of his liability, but this must be regarded as doubtful.

## A DEBTOR—CREDITOR RELATIONSHIP

Relationship of debtor and creditor

The legal basis on which a full and necessary control of the depositor's money could best be obtained was that of debtor and creditor, viz. to regard the banker as himself having borrowed the money from the

[1] Companies Act, 1929, s. 277; see also s. 136.
[2] *Loc. cit.*

depositor, his customer. Such a conception involved a departure from the original objective of the depositor which was simply the safe custody of his money, an aim which he probably shared with the majority of his descendants, since the average customer at a bank has not the least idea that he is lending his money to a banker to do what he likes with it. That it was adopted shows that our law is on occasion capable of a bold and liberal policy. This view was fully established in 1848.

### ILLUSTRATION. FOLEY *v.* HILL[1]

The plaintiff sued the defendants in Chancery for an account of moneys received by them as his bankers. The account being so simple as not to be a matter for a Court of Equity, the plaintiff shifted his ground and claimed that the relationship was equitable like that of principal and agent, and that he was entitled to an account on that basis. The defendants had received the money in question many years before the suit was brought, and had agreed to pay 3 per cent interest, but no interest had been paid or credited for over six years. The plaintiff claimed that the relationship being of a fiduciary nature the Statutes of Limitation did not apply to it.

*Held:* The relationship was the ordinary relation of debtor and creditor. Per Lord Cottenham. Money paid into a banker's is money known by the principal to be placed there for the purpose of being under the control of the banker; it is then the banker's money; he is known to deal with it as his own; he makes what profit he can, which profit he retains to himself . . . he has contracted, having received that money to repay to the principal when demanded a sum equivalent to that paid into his hands.

The converse of the usual position, i.e. the case where the customer has an overdraft, is more obviously a case of borrowing and lending, but essentially in legal principle there is no difference.

This debtor and creditor relationship is the basic principle of the law of banking. It does not, however, provide a sufficiently wide formula for the solution of all the problems, or the understanding of all the business of modern banking. Even at the time of *Foley* v. *Hill*[2]

[1] (1848), 2 H. L. C. 28
[2] *Supra.*

it was found necessary to add that there was also the obligation "arising out of the custom of bankers to honour the customer's drafts." This "superadded obligation" is however contractual in its nature. There are in modern banking other implied contractual obligations upon the banker, such as that of collecting his customer's cheques, and it appears to be most consonant with the present-day position to regard the relationship of customer and banker as based upon an implied contract of a complicated nature, and containing a number of terms, the first and most fundamental of which is that by which the banker undertakes to borrow from his customer such amounts as the latter chooses to lend, and to repay upon demand by honouring the customer's drafts. As to the other terms, one of the principal objects of this book will be to describe and discuss them.

**Superadded obligations**

It cannot be said that this view of the relationship has been entirely accepted by the Courts: it is, however, supported by weighty authority. In *Foley* v. *Hill*[1] Lord Campbell treats the relationship as one of contract, while in *Joachimson* v. *Swiss Bank Corportion*,[2] Atkin, L.J., in a judgment which is regarded as one of the most important ever delivered upon the subject of banking law took the same view. The following much-quoted passage[3] repays very careful study—

**An implied contract**

> The question seems to turn upon the terms of the contract made between banker and customer in the ordinary course of business when a current account is opened by the bank. It is said on the one hand that it is a simple contract of loan; it is admitted that there is added, or superadded, an obligation of the bank to honour the customer's drafts to any amount not exceeding the credit balance at any material time; but it is contended that this added obligation does not affect the main contract. The bank has borrowed the money and is under the ordinary obligation of a borrower to repay. The lender can sue for his debts whenever he pleases. I am unable to accept this contention. I think that there is only one contract made between the bank and its customer. The terms of that contract involve obligations on both sides, and require careful statement.

**The Joachimson Case**

[1] *Supra*. [2] [1921] 3 K.B. 110. [3] *Ibid.*, p. 127.

They appear upon consideration to include the following provisions. The bank undertakes to receive money, and to collect bills for its customer's account. The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds and undertakes to repay them. The promise to repay is to repay at the branch of the bank where the account is kept, and during banking hours. It includes a promise to repay any part of the amount due against the written order of the customer addressed to the bank at the branch, and as such written orders may be outstanding in the ordinary course of business for two or three days, it is a term of the contract that the bank will not cease to do business with the customer except on reasonable notice. The customer on his part undertakes to exercise reasonable care in executing his written orders so as not to mislead the bank or to facilitate forgery.

On this text a considerable part of this book will be a sermon, yet it does not purport to contain a full description of the terms of the contract, and it is even now highly questionable whether many of the services rendered to their customers by bankers fall within the ambit of the contract at all. This contractual conception of the relationship, however, obviously furnishes a flexible machinery for the further building up of banking law.

From the debtor and creditor relationship several important legal questions have arisen. The solutions which the Courts have found for these indicate that to treat the matter solely on so narrow a basis would lead to a wrong conception of the relationship.

(*a*) The general rule that the debtors' obligation to repay his creditor involves the duty of seeking him out and tendering payment does not apply to banker debtors. This rule is usually expressed by the maxim "the debtor must seek his creditor." The matter is of importance for several reasons. Supposing that the debtor must seek his creditor it follows—

(i) That the banker would be in a continuous state of default, and that the customer would be entitled to issue a writ against him claiming the repayment of the balance of his account without first calling upon

him to pay. Although this would not appear to be in practice a serious risk it actually happened in

**ILLUSTRATION. JOACHIMSON v. SWISS BANK CORPORATION**[1]

N. Joachimson was a firm consisting of German and English partners. They had an account with the defendant bank which on the 4th August, 1914, was £231 in credit. In June, 1919, this action was commenced by the English partner claiming repayment of the said sum in order that he might wind up the affairs of the partnership. He had not previously made any demand for payment.

*Held:* The customer's balance was not due to be repaid until a demand for it had first been made, and refused or not met, and the plaintiff's action therefore failed.

Demand of payment

The quotation from Lord Atkin's judgment already cited was but a preliminary to his holding "that it is necessarily a term of such contract that the bank is not liable to pay the customer the full amount of his balance until he demands payment from the bank at the branch at which the current account is kept."[2] It may be observed, however, that Warrington, L.J., seems to have been of opinion that the necessary demand might be made by the issue of a writ, but this seems to be contrary to the view of the majority and may be doubted.

(ii) Conversely the banker could repay the amount of the balance at any moment, thus for practical purposes closing the account, which would be a great inconvenience to the customer.

Statute of Limitations

(iii) The Statute of Limitations[3] would begin to run in favour of the banker as soon as he received any money, and in respect of each item as he received it. It is said, however, that it is in any case not the practice of the banks to rely upon the statute. In some cases the Court will presume that an outstanding balance has been repaid, as in *Douglass* v. *Lloyds Bank*,[4] and *Macdonald* v. *North of Scotland Bank*[5] where a credit account which had not been operated for over twenty years was held to have been extinguished by

[1] [1921] 3 K.B. 110.
[2] *Loc cit.*, p. 127.
[3] 21 Jac. I, c. 16; now replaced by 2 & 3 Geo. VI, c. 21.
[4] (1929), 34 Com. Cas. 263.
[5] [1942] S.C. 369.

long negative prescription. The question of when time begins to run against the bank in the case of an overdraft or loan to the customer would not appear to be governed by the same considerations, and in the writer's opinion the right of recovery by action in such cases becomes statute-barred after six years from the date of loan.[1]

(*b*) The question of whether a demand is necessary before the banker becomes liable and if so how it must be made is important in connection with garnishee proceedings, i.e. the procedure by which a customer's balance at his bank may be made available to satisfy his creditors who have obtained judgment against him.[2]

Garnishee proceedings

It is therefore clear that the contract of debt is legally at the basis of the relationship of banker and customer. But since every borrower of money, even if he undertakes to repay on demand, is not a banker it is necessary to look for some other element or elements. There is in modern banking one element which is so characteristic that it appears to furnish an infallible test, viz. that the repayment is made against a written order or mandate called a cheque. This seems to be an essential feature of banking as we know it, and appears to be an inevitable development from the growth of borrowing on an extensive scale, or as it may be properly called, the business of banking.

Banker and Moneylender

The re-lending of the borrowed money at profitable rates of interest is no less an essential feature of banking, indeed it is the reason why the banker carries on his business. It does not, however, legally speaking, afford any basis of differentiation from other types of moneylender. There is, of course, a fundamental commercial differentiation between the banker and the person called a "moneylender," but, legally speaking, it may not be easy to draw the distinction. From a social point of view it is important to prevent the two types overlapping, so that the "moneylender"

[1] There is a difference of opinion among textbook writers on this point. The writer accepts the view of Paget, *Law of Banking*, 4th ed., p. 286; see to the contrary, *Grant on Banking*, 7th ed., p. 182.

[2] This matter is dealt with in more detail in Chapter V.

is the only person prohibited in terms from styling himself a banker or even from representing indirectly that he carries on a banking business, and the certificate which every "moneylender" must now obtain in order to carry on business legally will not be granted if his trading name includes the word "bank."[1] Conversely, when the Moneylenders Act, 1900,[2] was passed, it was necessary to exempt banks from the operation of the statute.

The position is nevertheless very unsatisfactory, because there is nothing to prevent anybody, except a professed moneylender, from carrying on business as a banker, and deplorable cases occur from time to time.[3]

In Canada a certificate from a Government authority is necessary before a banking business can be started.

As has been indicated in Chapter I there are numerous other functions performed and services rendered by bankers. Some of these are rendered equally by other business and professional men: others are peculiar to banking but are purely ancillary to the main business, and cannot be regarded as being fundamental to the relationship of banker and customer.

## DEFINITION OF BANKER

Meaning of term "banker"

The foregoing considerations will materially assist in the formulation of a definition of the term "banker." In the Bills of Exchange Act, 1882, Sect. 24 the term "banker" is defined as including "a body of persons, whether incorporated or not, who carry on the business of banking." This has been much criticised, though the draftsman's object was perhaps only to make clear that the Act is concerned not only with individuals but with firms and companies. It is nevertheless unsatisfactory, because (*a*) it is not sufficiently definite: the word "includes" suggests that it is possible to be a banker without carrying on a banking business, which seems to be nonsense; (*b*) it assumes a knowledge of

[1] Moneylenders Act, 1927, 17 & 18 Geo. V, c. 21, s. 4 (3).
[2] See 63 & 64 Vict., C. 51, s. 6 (*d*).
[3] See the *Bankers' Magazine*, Vol. CXLV, p. 665, for examples.
[4] 45 & 46 Vict., c. 61.

what is meant by "banking business." Similar so-called definitions appear in other statutes.[1] The statutes requiring bankers to make returns[2] do not contain definitions of the word. In any case none of the statutory definitions is completely general, but only for the purposes of the Act in question, and it is quite possible that for some purposes the word has a wider or narrower connotation than for others. It is partly for this reason that no satisfactory definition can be extracted from the cases which are described by Paget[3] as "not by any means clear or conclusive."

In the absence of the proposed statutory register of banks it seems unlikely that the term "banker" can be successfully defined otherwise than by reference to the business of banking whether or not that expression be used in the definition. Moreover, since the Bills of Exchange Act, 1882, is much the most important statute relating to the matter, it is probable that the Courts when the question comes before them will bear the words of Sect. 2 in mind. The matter boils down therefore to defining the expression "banking business." Banking business But the extent of this has already been indicated in Chapter I, and to construct a definition which would embrace the whole of it is manifestly impossible. It is rather a question of description than of definition, of fact than of law. It is, moreover, obvious that not every bank need conduct the same type of business as its neighbour; some may specialise in one aspect, others in another. It is accordingly necessary to extract the lowest common denominator and to decide what is the absolutely essential part of such a business. It is here that the analysis of the relationship of banker and customer already made is helpful. Moreover, in so far as the matter is to be regarded as one of fact for a jury of business men, it may be taken as fairly certain that they would look for the use of cheques as an

[1] E.g. the Stamp Act, 1891, 54 & 55 Vict., c. 39, and the Finance (No. 2) Act, 1915, 5 & 6 Geo. V., c. 89; Agricultural Credits Act, 1928, 18 & 19, Geo. V, c. 43.

[2] See Chapter II.

[3] *The Law of Banking*, 4th Ed., p. 3.

essential of banking business. The receipt of money on loan and the obligation to repay it on demand against cheques seem to be the basic elements of the business. If a person carries on a business involving such borrowing and the issue of cheques it is submitted that it is a banking business; if it does not, the business is not legally banking even though he call himself a banker.[1]

It may be objected that a good deal of what is called merchant banking does not satisfy these requirements. This is true, but it may be answered that in modern times banking has become much more specialised, and that a great deal of business of a financial character formerly regarded as banking is now really outside the category. At any rate it is with the more limited type of banking that the Bills of Exchange Act, 1882, and this volume are concerned. That this view is correct is supported by Dr. Hart's definition of a banker[2] as "one who in the ordinary course of his business honours cheques drawn upon him by persons from and for whom he receives money on current account." The passage from Lord Atkin's judgment in *Joachimson* v. *The Swiss Bank Corporation*[3] already quoted, indicates that his view is to the same effect. Paget[4] singles out four factors, all of which he says must be present in order that there may be a banking business. These are (i) deposit accounts; (ii) current accounts; (iii) the issue and payment of cheques; (iv) the collection of cheques. It is clear that these factors are all present in practice. It is not, however, easy to see why a banker should cease to be a banker (legally speaking—no doubt he would commercially) if he only accepted current accounts, or even if he refused to collect cheques. It is true that (iv) seems to be regarded as essential both by Lord Atkin and Dr. Hart.

Hart's definition

[1] A definition of sorts will be found in Statutory Rules and Orders, 1938, No. 656, in the Unemployment Insurance (Banking Industry Special Scheme) Amendment Order.

[2] Hart's *Law of Banking*, 4th Ed., p. 1.

[3] *Supra*.

[4] *Loc. cit.*, p. 5.

As appears from Dr. Hart's definition these activities must be ordinary and not exceptional business. Whether they must also be the main business of the firm conducting them is not clear. In *Stafford* v. *Henry*[1] one Labertouche had carried on a very varied business, part of which was at that time regarded as banking, but as it was not his main business it was held that he was not a banker. Some large departmental stores afford banking facilities to their customers. Where cheque books are not issued it would appear that they are not to be regarded as bankers. Where they are it may be a difficult question whether they are banks for the purposes of the Bills of Exchange Act, 1882. A solution would lie in the formation of subsidiary companies for the purpose of conducting the banking part of the business.

The concentration of the mass of the country's banking in a few great institutions has, however, deprived the subject of most of its practical importance, as is evident from the scarcity of recent cases even bearing on the subject.[2] Bank cashiers will seldom be faced with the question whether cheques drawn on unknown institutions may be safely handled, though occasionally difficulties may arise in connection with upstart institutions such as the John Bull Bank which figures in *Ladbroke* v. *Todd*.[3]

## DEFINITION OF CUSTOMER

The precise meaning to be attached to the term "customer" is of greater practical importance because while banks are few, the persons with whom they do business are innumerable. There is no statutory definition of the term "customer," but it may be of great

**Meaning of term "customer"**

[1] (1850) 12 Ir.Eq.R. 400. The definition of banker is much discussed in this case, but it was in connection with an Act of George II dealing with banks of issue, and has little modern relevance. See also *Davies* v. *Kennedy* (1869), I.R. 3 Eq. 693.

[2] *Re Birkbeck Permanent Benefit Building Society*, [1912] 2 Ch. 183, seems to be the most recent. The primary business there was that of a building society, and the question was whether the banking business actually conducted was *ultra vires*.

[3] (1914), 30 T.L.R. 433.

importance to know whether a particular person who is in business relationship with a banker is to be regarded as legally his customer. A banker owes various duties to his customer, such as that already examined of treating his affairs as confidential, and a customer in his turn has obligations towards his banker. Some of these are implied from the relationship and others arise by virtue of the crossed cheque sections of the Bills of Exchange Act, 1882, especially Sect. 82. It has been in connection with the interpretation of this section in which the word "customer" appears[1] that the Courts have had to consider the matter.

It might be thought, from analogy with other kinds of business, that everybody with whom a banker has dealings in the ordinary way of his business is his customer. This is a possible and indeed the most obvious meaning. The word has, however, acquired a technical meaning under the Bills of Exchange Act, 1882, although the precise significance of this is not perhaps quite clear. There are two possible views of the meaning of the word under the Act, viz. that a customer is (*a*) any person who has opened an account at a bank, or (*b*) any person who has both opened an account, and also made use of it. Whichever of these views is correct, it is clear that there must be an account. The authorities are not clear beyond this, indeed Paget who thinks that (*b*) is, or at any rate should be, the correct opinion finds them "conflicting to a bewildering degree."[2] The more recent authorities all point, however, to (*a*) being the correct view, and Dr. Hart defines the customer as "one who has an account with a banker."[3] As has been already mentioned, the relevant cases have all arisen in connection with Sect. 82 of the Bills of Exchange Act, 1882. It might well be argued that for other purposes the wider general meaning of a person with whom one has dealings should be applicable. A closer analysis will show,

[1] See Chapter VI.
[2] Paget, *loc. cit.*, p. 9.
[3] Hart, *loc. cit.*, p. 2.

however, that such a meaning will seldom be applicable: there could, for example, be no duty of confidence towards a person with whom he had casual commercial transactions. Moreover, it would be exceedingly inconvenient to have one meaning for the word in one connection and another in another.

That there must be an account or the equivalent was established by

**ILLUSTRATION. GREAT WESTERN RAILWAY *v.* LONDON AND COUNTY BANK[1]**

One, Huggins, a rate collector, had been in the habit of cashing cheques over the counter at the defendants' bank for a number of years. No account, however, had been opened. He obtained a cheque from the plaintiffs by fraud which he cashed with the defendants. The plaintiffs sued to recover the value of this cheque, and the substantial question was whether Huggins was a customer of the defendants.

*Held*: That as there was no sort of account he was not a customer.

It can be said that in no case where it has been contended that a person who had no account was a customer has this contention succeeded.[2] In *Ladbroke* v. *Todd*[3] Bailhache, J., was clearly of opinion that the mere opening of an account without the actual drawing of money was sufficient to constitute the relationship, and in *Commissioners of Taxation* v. *English, Scottish, and Australian Bank*[4] his view was followed and it was stated that "the word 'customer' signifies a relationship of which duration is not of the essence. . . . The contrast is not between an habitué and a newcomer, but between a person for whom the bank performs a casual service . . . and a person who has an account

[1] [1901] A.C. 414.
[2] In *Matthews* v. *Brown & Co.* (1894), 10 T.L.R. 386, which is relied upon by Paget in support of his view that there must be actual dealings, it was considered that one transaction did not make a customer, but there was no account opened. In *Lacave* v. *Crédit Lyonnais*, [1897] 1 Q.B. 148, Collins, J., treated the last case as deciding that "no one but a customer in the proper sense of the word, a person having an account at the bank, would be entitled to the benefit of the section."
[3] (1914), 30 T.L.R. 433.
[4] [1920] A.C. 683.

of his own at the bank." This is a decision of the Privy Council and technically not binding upon English Courts. The Court was a strong one, however, and there seems little doubt that its opinion would be followed.

**ILLUSTRATION. LADBROKE *v.* TODD**[1]

The plaintiffs drew a cheque and sent it to the payee by post. The letter was stolen and the thief took it to the defendant, a banker, and used it for the purpose of opening an account for the purpose of which he forged the payee's endorsement. The defendant accepted the account, and had the cheque cleared specially. On the discovery of the fraud, the plaintiffs brought this action against the defendants for conversion. One of the main questions raised was whether the account having been opened by payment in of the cheque to be collected, the defendant could properly be regarded as having received payment "for a customer."

*Held:* That as the account was already opened when the cheque was collected, payment had been received for a customer.

[1] *Supra.*

# CHAPTER IV

## CHEQUES

THE cheque is the written order by which the customer requires his banker to repay the money which has been lent to him: in law it is technically described as a *mandate*. By the terms of this mandate the customer may require the banker to make the payment in question either to himself or to a third party. In its modern form the cheque is simply a particular type of bill of exchange. It is, therefore, a negotiable instrument carrying the advantages, and also the disadvantages, which attach to negotiability. **Mandate**

**Repayment without cheque**

Whether the customer can legally require repayment by any other means than that of a cheque has never been decided—normally customers always use cheques. If a cantankerous customer were to demand repayment personally at his bank without presenting a cheque, the manager would probably let him have the money, at any rate if his account was worth retaining, though he would require a receipt. If, however, payment was required to be made to a third party otherwise than by cheque, the position would be more difficult, because various protections of considerable importance are conferred by the Bills of Exchange Act, 1882, upon bankers when paying cheques.[1] It might accordingly be very much to the banker's advantage to be able to take up the attitude that his obligation is to repay against his customer's cheque and not otherwise.

**Established practice**

Apart from cases of assignment, such an attitude would seem reasonable, for it is in accordance with established practice, and it may well be that this practice is so universally observed as to amount to a usage of banking business which is binding upon the customer, and indeed is an implied term of the contract between banker and customer. Lord Atkin seems to be

[1] See p. 86, *et seq.*

of this opinion when in the *Joachimson Case*[1] he says of the promise to repay "it includes a promise to repay any part of the amount due, against the written order of the customer." Dr. Hart,[2] speaking of the banker's liability in respect of money borrowed from the customer, says "his only liability in respect of it being a personal obligation to his customer to honour cheques drawn by him upon his account."

## ASSIGNMENTS

Assignment of balance

On the other hand, the right to be repaid his debt is clearly assignable by the customer,[3] and if there has been an assignment to a third party it will not only be effective to oblige the banker to pay the amount, subject to any existing rights or equities against the customer, but after once having notice of it his obligation will no longer be to his customer but to the assignee, which if necessary the latter can enforce by action. In this respect an assignment differs fundamentally from a cheque, which does not of itself operate in England as an assignment of funds in the hands of the banker.[4]

Conditions of assignment

The student should already be familiar with the conditions which govern assignments, but it may be useful to recapitulate them shortly.

(i) There are two methods of assignment; the statutory and the equitable.

(ii) Of these the former introduced by the Judicature Act, 1873, and now governed by the Law of Property Act, 1925, Sect. 136, is most commonly used. To be effective a statutory assignment must: (*a*) be made in writing and signed by the assignor (the creditor); (*b*) be absolute and not made by way of charge and must be of the whole amount of the debt;[5] (*c*) in order that the assignment may be binding on the debtor

[1] [1921] 3 K.B., 112 at p. 127.
[2] *Law of Banking*, Vol. I, p. 3.
[3] *Walker* v. *Bradford Old Bank* (1884), 12 Q.B.D. 511, at p. 516.
[4] See Bills of Exchange Act, 1882, s. 53 (1) and *Schroeder* v. *Central Bank* (1876), 34 L.T. 735.
[5] This latter requirement was regarded as doubtful for many years, but may now be taken as beyond dispute; see *Williams* v. *Atlantic Assurance Co.*, [1933], 1 K.B. 81.

written notice of it must be given to him, the right of the assignee not becoming effective until the receipt of such notice. Conversely an assignment is not effective until the assignee has notice of it, though the debtor may have assented to it.

**ILLUSTRATION. REKSTIN *v.* SEVERO SIBIRSKO, ETC., AND BANK FOR RUSSIAN TRADE**[1]

A company against whom judgment for a sum of money had been given sent instructions to their bank to transfer the balance of their account to another company. The transfer was duly effected in the books of the bank, but before the assignee had received notice of what was being done, a garnishee order *nisi* was served on the bank attaching the customer's balance in satisfaction of the judgment debt.[2]

*Held:* That the garnishee order was effective to bind the balance; as at the time of its service the balance was still held for the account of the judgment debtor.

(*d*) The assignee takes the right to recover the debt "*subject to the equities*," i.e. subject to all rights of set off or otherwise which exist at the time of the assignment between debtor and creditor.

(iii) Equitable assignments are such as could be enforced in Courts of Equity before the Judicature Act, 1873. This was an imperfect method because the Court of Equity (Chancery) could only grant relief indirectly by compelling the assignor to allow the assignee to use his name for the purpose of bringing the necessary action against the debtor to recover the debt. The Judicature Act left this form in existence, and it may be found valuable when some of the necessary conditions of a statutory assignment have not been fulfilled. For example, the assignment need not be in writing, the notice to the debtor need not be in writing, and the whole of the debt need not have been assigned; this latter point may be of value to a banker's customer, for it means that in equity he can validly assign part of his balance. There must, however, be valuable consideration for such assignments.

[1] [1933] 1 K.B. 47.
[2] As to garnishee proceedings see p. 62, *post*.

## IMPORTANCE OF CHEQUE SYSTEM

**Fundamental importance of cheque in banking**

The practice, and probably the law, as to payment against cheques being as above described, it is obvious that this instrument is one of fundamental importance in present-day banking, which could hardly be carried on without it.[1] For the rank and file of bank officers, it is the instrument with which they are most intimately concerned, and since it is one the transfer and handling of which give rise to important and difficult legal questions, there can be no doubt that the most important practical aspect of banking law is that which concerns cheques. It is, therefore, proposed to deal with this subject in somewhat greater detail than with most of the other topics discussed in this book, and to take it at the outset, though this may in some respects appear to be an illogical order of procedure.[2]

Originally the customer wrote out his order, or note as it was then usually called, and there was no settled form. Printed forms of order varying only very slightly according to the practice of the different banks which issue them, have long been in use,[3] but there is no reason why a customer should not write out his own cheque on a sheet of notepaper, e.g. if he has mislaid his cheque book,[4] unless, of course, his account has only been opened on condition that cheques issued by the bank are used. Even so it might be good business for the bank to waive this condition.

## ESSENTIALS OF A CHEQUE

To be a true cheque the order must comply with the statutory definition given in Sect. 73 of the Bills of

[1] The introduction of the penny stamp on cheques by the Stamp Act of 1853 seems to have led to an enormous expansion in the use of cheques.

[2] Before reading the following chapters the student is strongly advised to refresh his memory by re-reading the sections of the Bills of Exchange Act, 1882, which deal expressly with cheques, viz. S. 60 and SS. 73–82, as it will be necessary to assume an elementary acquaintance with some matters, e.g. crossings, at a stage earlier than they can be discussed in detail.

[3] In 1729 the house of Child issued printed forms of note with appropriate blank spaces.

[4] Cf. *Roberts & Co.* v. *Marsh*, [1915] 1 K.B. 42.

Exchange Act, 1882, which must be examined in detail. A cheque is a bill of exchange drawn on a banker and payable on demand. The student should already be familiar with the terms used in this definition: "bill of exchange" is defined in Sect. 3 of the Act, "banker" in Sect. 2 on which we have already commented, and "on demand" in Sect. 10. The definition of "bill of exchange" is of such fundamental importance that it is proposed to consider it in detail as applied to cheques notwithstanding our premise that a knowledge of the law of bills will be assumed.

Definition of cheque

In the first place, it is useful to write out the definition of a cheque in full as follows: a cheque is an unconditional order in writing drawn by one person upon another, who must be a banker, signed by the drawer, requiring the banker to pay on demand, or at sight, or on presentation, or expressing no time for payment, a sum certain in money to or to the order of a specified person or to bearer. It will be noticed at once that—

(*a*) There is no requirement that the cheque should be drawn by a customer of the banker on whom it is drawn. Paget says "it is somewhat difficult to contemplate a cheque not drawn by a customer,"[1] and in practice *bona fide* cheques will always be so drawn, but it is quite possible to contemplate a fraudulent person stealing a cheque book and drawing and issuing cheques therefrom. These would not cease to be cheques by definition, and might confer rights upon holders thereof, e.g. against endorsers though if the drawer had forged the signature of the person whose cheque book he had stolen such signature would be inoperative.[2]

(*b*) Chalmers says[3] "all cheques are bills of exchange, but not all bills of exchange are cheques." To be good

[1] *Op. cit.*, p. 97. The drafts drawn under letters of credit are of course drawn by persons who are not customers. These are usually bills, but apparently sometimes conform to the requirements for cheques.

[2] Bills of Exchange Act, 1882, s. 24.

[3] *Op. cit.*, p. 290.

as a cheque, the mandate must accordingly fulfil all the requirements of the above definition. It will, therefore, be necessary to analyse these requirements in detail.

Cheque an order

(i) Being a bill the cheque must be in the nature of an *order* to the banker. Difficulty can seldom arise as to this because bankers naturally make use of a printed form of cheque which satisfies the Act. Most forms of cheque commence baldly with the word "Pay," but the form "Please to pay" which still survives is none the less imperative because couched in more courteous language.[1]

Unconditional

(ii) The order must be *unconditional*. It follows that if the drawer makes the carrying out of the order subject to any condition the instrument is not a cheque. An order to pay out of a particular fund, as a special account, is regarded as conditional,[2] but not if the order be unconditional though coupled with an indication of a particular fund out of which the drawee is to reimburse himself or of a particular account to be debited.[3] It is common form for a cheque to contain such an indication, e.g. the words "No. 1 A/c" written on the cheque, and this may be taken to be unconditional. The principal difficulties which have arisen have been due to drawers wishing to obtain receipts from their payees. When debts are being paid by cheque, which is now their principal use, it is obviously convenient to have the receipt upon the very instrument by means of which payment is made. It has accordingly become a common practice, especially among public authorities when making payments and trading companies, when paying dividends,[4] to require the payee to give such a receipt, which it is often stated will be accepted in lieu of endorsement. When the order part of the instrument contains such a requirement, it is clearly not unconditional and the instrument cannot be a cheque.

Receipt forms

[1] The common form of a French bill runs "*il vous plaira payer.*"
[2] Bills of Exchange Act, 1882, s. 3 (3).
[3] *Ibid.*
[4] The warrants used are usually in form cheques.

**ILLUSTRATION. BAVINS v. LONDON AND SOUTH WESTERN BANK**[1]

The plaintiffs received an instrument in the form of a cheque reading "Pay to J. Bavins the sum of sixty-nine pounds. Provided the receipt form at foot hereof is duly signed, stamped and dated." This document was stolen from the plaintiffs, the receipt form being then unsigned. Afterwards it was paid into the defendant's bank for collection bearing an endorsement and with the receipt form signed—these signatures were forgeries. In an action by the plaintiffs against the collecting bank it was held that the instrument was not a cheque.

But if the instruction is not part of the order but is addressed solely to the payee the order should be regarded as unqualified, and the requirements of the section are satisfied.[2]

**ILLUSTRATION. NATHAN v. OGDENS**[3]

The defendants owed money to the plaintiffs under a bonus scheme. They went into liquidation and the liquidator issued a cheque in payment which was in the ordinary form, but bore at the foot and not as part of the order the clause "the receipt at back hereof must be signed which signature will be taken as an endorsement of this cheque." On the back there was a printed form of receipt.

The question whether this document was in law a cheque was raised during the course of the case, and the judge expressed the opinion that it was, the condition being addressed to the payee, not to the banker.

It is considered by some writers, however, despite this opinion, that the position is not clear,[4] the argument being that the banker cannot safely pay such an instrument unless the receipt is signed, on the ground that the customer might say that it was part of his instructions that the instrument should only be paid if presented in a proper state, i.e. bearing the receipt clause properly signed. The answer to this would appear to be that the customer has not included such an

[1] [1900] 1 Q.B. 270.
[2] See Hart, *op. cit.*, p. 328.
[3] (1905), 93 L.T. 553; see also *Thairlwall* v. *G.N. Rly.*, [1910], 2 K.B. 509.
[4] See Sheldon, *Practice and Law of Banking*, 4th ed., p. 172; and Paget, *op. cit.*, p. 103.

instruction in his order, and that the banker is not concerned with any private request which the drawer may make to the payee for his convenience. If this be correct, it would appear that an instruction of this kind addressed to the payee has no legal effect. It is understood, however, that the banks in practice ask for the due completion of the receipt form.

Another similar type of memorandum, which is common form on dividend warrants is directed to securing that the instrument shall be paid within a particular period, usually three or six months. The requirement to this effect is seldom or never part of the order, but appears at the foot. If so, according to the argument already accepted above, the order is not qualified, and the instrument may be good as a cheque.

**ILLUSTRATION. THAIRLWALL *v.* GREAT NORTHERN RAILWAY[1]**

The plaintiff was a stockholder in the defendant railway company which sent him a dividend warrant, the order part of which was unconditional, but which contained at the foot the words: "Note.—This warrant must be signed by the person to whom it is payable and presented for payment through a banker. It will not be honoured after three months from date of issue unless specially endorsed by the secretary." This warrant was lost in the post and never reached the plaintiff who sued the defendants for the amount. They contended that the posting of the warrant was the equivalent of payment. To which the plaintiff replied that the warrant in the above form was not a cheque.

*Held* (assuming that it needed to be a cheque): That it was in fact an unconditional order and in the circumstances constituted payment.

When instruments in this form are presented for payment after the period indicated has expired, it appears to be the practice of the banks to refuse payment unless expressly authorised by the drawer. This being so, it would certainly be dangerous for a bank to pay such a "stale" instrument without such authorisation. It may well be, however, that a refusal to pay in such circumstances amounts to dishonour, yet the banker could hardly be held liable in damages for having

[1] [1910] 2 K.B. 509.

carried out what appear to be the wishes of his customer. This position is anomalous and adds to the difficulties already indicated in connection with receipt clauses.

The statement that the signature of the receipt will be accepted as an endorsement also gives rise to difficulty, and will be discussed below.[1]

Writing

(iii) It is in the nature of every negotiable instrument that it should be in writing. It would not appear to matter in what medium the writing be executed whether in print, writing, or other legible method. It has, however, been questioned whether a cheque written in lead pencil should be paid.[2] This view can be supported on the ground that such a drawing of a cheque would be negligent conduct by the customer within the *McMillan Case*,[3] which will be discussed below.[4]

Banker drawee

(iv) "Drawn by one person upon another who must be a banker." It follows from this that the ordinary banker's draft which is drawn by a branch upon its head office or upon another branch is not a cheque.[5] For this reason it was for a long time questionable whether such a draft could be effectively crossed, and there could be little doubt that the sections of the Bills of Exchange Act, 1882, relating to crossed cheques did not apply. This led to the passing of the Bills of Exchange Act, 1882, Amendment Act, 1932,[6] by which the application of these sections to banker's drafts is secured.

Demand

(v) In the form of cheque ordinarily used no time for payment is expressed, and this is by Sect. 10 of the Act equivalent to making the instrument payable on demand.

## FORM OF THE CHEQUE

The form of cheque in use is with slight variations common to all the banks. It is no doubt familiar to

[1] Pp. 58, 101, *post*.
[2] Sheldon, *op. cit.*, pp. 2, 4.
[3] [1918] A.C. 777.
[4] P. 74, *post*.
[5] See *Capital and Counties Bank* v. *Gordon*, [1903] A.C. 240; the dictum to the contrary in *Ross* v. *London County and Westminster Bank*, [1919] 1 K.B. 678, is clearly an oversight.
[6] 22 & 23 Geo. V, c. 44.

students but an example is set out here together with an example of a bill of exchange, payable at three months.

---

LONDON *1st March*, 1937.

*No*.................

XYZ BANK LIMITED
000 Strand, W.C.

2d. Stamp

Pay *Alfred Jones* .......................................... or Order
the sum of *one thousand pounds*
£1000 0 0

WILLIAM BROWN.

---

LONDON *1st March*, 1937.

£1000 Three months after date pay to
John Smith or order the sum of one
thousand pounds value received

10/- Stamp

*Accepted A. Marshall*

TO ALFRED MARSHALL

WILLIAM JONES

---

On a comparison of these instruments it will be seen that there are various immaterial differences in the position, e.g. of the figures denoting the amount to be paid and of the stamp.

**Cheques not accepted**

In addition to this it will be observed that the bill has been accepted while the cheque has not. Cheques are not in practice accepted by the drawee bank. The acceptance of a bearer cheque would be an infringement of the Bank Charter Act, 1844,[1] for the instrument would then be a bank bill. There is no legal objection to an order cheque being accepted, but it would have the

[1] 7 & 8 Vict., c. 32, ss. 11 and 78.

practical drawback of making the bank legally liable to a holder.[1] As it is the drawer is the person primarily liable to the holder, and the bank is under no liability upon the instrument at all; its liability is to its customer upon the contract between them. A bill payable at a future date will be accepted by a bank as a method of providing finance for a mercantile transaction. The primary liability is thus upon the bank, a fact which naturally gives a bill so accepted a great advantage over a cheque for discount purposes.

**Marked cheques**

Attempts have been made, particularly in the U.S.A. and Canada, to overcome this difficulty by obtaining a certification upon the cheque by the drawee bank to the effect that the drawer's account is sufficiently in funds to provide for payment of the instrument in question. This may be effected by writing "good" across one corner of the cheque, and adding the bank's official stamp initialed by the cashier.[2] Such a cheque is said to be "marked." The value of the marking lies in the fact that it gives "the cheque additional currency by showing on the face that it is drawn in good faith on funds sufficient to meet its payment, and by adding to the credit of the drawer that of the bank on which it is drawn."[3] This marking is not legally speaking equivalent to an acceptance and "does not make it current as cash." At the most it appears to be a representation to the payee or to a person proposing to become a holder as to the state of the drawer's account at the time of the marking.[4] Such a representation could hardly be construed as a binding promise that the account will be kept sufficiently in credit to meet the cheque when presented, though it is said that in practice a bank will earmark sufficient funds to

[1] See the important judgment of the Privy Council (per Lord Wright) in *Bank of Baroda Ltd.*, v. *Punjab National Bank, Ltd., and Others*, [1944] 2 All E.R. 83, where it is stated that "there is no case in the books of the acceptance of a cheque."

[2] See Evitt, *Practical Banking*, 3rd Ed., p. 125.

[3] See *Gaden* v. *Newfoundland Savings Bank*, [1899] A.C. 281 at pp. 285 *et seq*.

[4] This was the view taken by the Privy Council in *Gaden* v. *Newfoundland Bank*, *supra*.

meet the cheque.[1] In any case it is difficult to see how, in the event of its proving inaccurate, a holder could make the certifying bank liable upon it, except in the rare event of fraud.[2] It might be argued that the representation would create an estoppel,[3] but no action will lie upon a bare estoppel, and since the holder could not sue the bank upon the cheque even if the account were in funds, there appears to be no duty upon which an action could be founded.[4]

The practice of marking cheques has been condemned by the London Clearing Bankers. It is a practice which must, of course, be carefully distinguished from that prevailing in connection with the clearing of late cheques at the Clearing House. If it is desired to add the credit of the bank to the instrument this can be done much more effectively by the banker issuing the draft himself; a banker's draft issued by one of the big banks being for practical purposes the equivalent of cash.

Stamp

It will be observed that while the bill in our illustration bears a stamp for ten shillings, the cheque, although for the same amount, is stamped for only twopence. The reason for this is that bills payable otherwise than on demand or at sight or on presentation within three days after date or sight require an *ad valorem* revenue stamp,[5] while a cheque being a bill

[1] Evitt, *op. cit.*

[2] But see Paget, *op. cit.*, p. 165, for the view that the bank cannot be liable on the representation at all since it is not made to the holder.

[3] Estoppel is a rule of evidence by which a person who has misled another into altering his legal position by some false representation or conduct will not afterwards be allowed to give evidence as to what is the true state of affairs, but will be held down to the position which he represented as actually existing. This doctrine is frequently applied in banking law and should be properly grasped. Reference may be made to any text book on the Law of Evidence.

[4] In *Bank of Baroda, Ltd.* v. *Punjab National Bank, Ltd.*, *supra*, the whole of the above analysis was in substance accepted by the Privy Council. It was moreover found that, in India at any rate, the evidence was not strong enough to establish a trade usage under which the bank could be held liable. No such custom seems to have developed in England and it may be hoped that this case will finally give the *coup de grace* to the whole subject of marked cheques.

[5] Finance Act, 1918, s. 36.

[6] Stamp Act, 1891, Schedule, and Finance Act, 1899, s. 10; see Appendix I on Stamp Duties, pp. 314, *et seq.*, *post.*

payable on demand requires a two-penny stamp whatever its value—the amount was originally one penny, but was raised to two pence during the War of 1914–18, at which figure it has since remained.[1] The *ad valorem* stamp on an inland bill must be impressed upon the document, not affixed, or the instrument is void.[2] This is intended to prevent evasions. In practice therefore, such bills are always drawn on stamped forms. A bill payable on demand, including a cheque, can be stamped with an adhesive stamp provided it is effectively cancelled by the drawer before he issues it.[3] Cheque forms are, of course, issued by the banks as a matter of convenience on paper bearing impressed stamps, but since the stamp may be adhesive it is quite easy for the customer to draw up a cheque for himself and affix a stamp. Moreover, if he omits to affix the stamp the bank may still do so for him when the instrument is presented for payment.[4] Although this preserves the validity of the cheque it would not appear to remove the liability to a penalty for issuing the instrument unstamped. It is only upon the paying bank that this privilege of stamping the instrument after issue is conferred, a holder of an unstamped cheque is not entitled to affix a stamp.

**ILLUSTRATION. HOBBS v. CATHIE**[5]

The defendant bought a horse from one, Bull, with a warranty that it was sound. He gave Bull an unstamped cheque in payment, and the latter stamped it and negotiated it to the plaintiff. The defendant believing the warranty to be broken countermanded payment at his bank, and the plaintiff brought this action.

*Held:* That he could not recover in the circumstances.

## POST DATED CHEQUES

The stamp is, of course, no part of the instrument as such, it is required simply for revenue purposes. The

Finance Act, 1918, s. 36.
Stamp Act, 1891,. s 38.
Stamp Act, 1891, s. 34 (1) and s. 38 (1)
*Ibid.*, s. 38 (2).
(1890), 6 T.L.R. 292.

position in the case of cheques is comparatively simple, except for the difficulties which arise from post-dating. It is obviously an advantage to the drawer of a cheque to ensure that it will not be presented for payment before a certain date, e.g. when he gives it at the time of borrowing money: (post-dated cheques are most commonly met with in connection with moneylending transactions). This he can do by inserting the date agreed for repayment. A cheque drawn in this way is no longer practically speaking payable on demand; it approximates to a bill of exchange payable at a future date. If a post-dated cheque is used for the payment of a large amount, the Stamp Act is evaded and the Revenue defrauded of a substantial sum. These instruments are to some extent used deliberately for this purpose, but more usually simply as a matter of convenience. The Stamp Act is inaptly worded for the prevention of this. A penalty of £10 is imposed upon a person who with intent to defraud the Crown executes or is concerned with the preparation of an instrument which does not truly set out the facts and circumstances which make it liable for duty.[1] This penalty is largely inoperative to prevent post-dating, since the circumstances will seldom provide an opportunity for its enforcement. The Stamp Acts do not themselves expressly avoid post-dated cheques, and though it might be argued that they are really liable to an *ad valorem* duty and are therefore void because not issued on stamped paper,[2] the opinion is commonly held that they are legally to be regarded as payable on demand, and are therefore properly stamped on issue with a twopenny stamp. Moreover, the Bills of Exchange Act, 1882[3] expressly provides that "a bill is not invalid by reason only that it is ante-dated or post-dated," and it has been held that post-dated cheques are in fact valid and negotiable.[4] As no sensible person would bring an action upon a post-dated cheque before its date had

**Post-dated cheques**

[1] Stamp Act, 1891, s. 5.
[2] See p. 43, *ante*.
[3] S. 13 (2).
[4] *Royal Bank of Scotland* v. *Tottenham*, [1894] 2 Q.B. 715.

arrived, the instrument would always be in order at the time it came before the Court, and no objection to the stamp would then be raised.

From the point of view of banks, care is necessary when handling post-dated cheques. Whether or not such an instrument is technically still payable on demand, it seems clear that the drawer's mandate to his banker is that it should not be paid until the date upon it arrives. If it is paid before this date, it would appear that the account cannot properly be debited with the amount thereof—at any rate before the date in question—and during the intervening period there might be a countermand, or presentment of cheques exhausting the balance, which would clearly raise difficult questions.

It has been suggested that if the bank paid before the date of the instrument, it could claim as against its customer the drawer to have become holder in due course. This, however, is a matter of intention, and it is considered that with no evidence other than the fact of the payment before it, a Court would not draw an inference to the necessary effect. Since the post-dated cheque is valid, it cannot be suggested that the bank can refuse to pay it, e.g. if after being presented and refused payment before the due date, it is afterwards re-presented on or after that date, on the ground that it is known to be a post-dated cheque.[1]

**Exemptions from Stamp Duty**

Certain cheques such as those drawn by Government officials, and registered friendly societies need not be stamped, but this privilege does not extend to cheques drawn by local government authorities. A number of other instruments which are met with in banking are also exempted.[2] Of these the most important are (i) bills and notes issued by the Banks of England and Ireland; (ii) drafts and orders drawn by bankers upon each other solely for the purpose of settling and clearing accounts; (iii) a letter written by one banker to another directing him to pay a sum of money, the

[1] See Paget, *op. cit.*, p. 113.
[2] Stamp Act, 1891, s. 39.

letter in question not being entrusted to the payee or to any person on his behalf. Drafts, orders, and letters under exemptions (ii) and (iii) must not be payable to order or to bearer, and the bankers making use of them must be within the United Kingdom; (iv) a letter of credit granted in the United Kingdom authorising drafts to be drawn out of the United Kingdom payable in the United Kingdom. This important exception covers the ordinary banker's documentary letter of credit.[1]

Chequelets

An attempt to devise a form of instrument which without being a cheque would fulfil the purpose of one was made by the Midland Bank some years ago, but failed owing to the wide provisions of the Stamp Act, and may be noticed here though only of historical interest because it shows how revenue statutes may have indirect cramping effects upon commercial developments.[2] The use of cheques for the payment of small bills has increased considerably of late years, and has become one of the most useful services afforded by the banks. There is, however, considerable resentment among cheque users that every time the wear and tear on the country's legal currency is relieved by the use of a cheque a tax of twopence has to be paid to the State. The Midland Bank proposed to avoid this by the use of a printed form of receipt issued by the bank which was to be filled in for the amount of the debt, handed to the tradesman, and presented at the bank for payment on his behalf. It would then be paid under the terms of a general authorisation previously signed by the customer. It was, of course, only proposed to use these so-called receipts for payment of sums of under two pounds, as in cases of larger amounts a receipt stamp would have been necessary.

These "chequelets" as they were called were in the following form—

[1] See Chapter X.

[2] See *Midland Bank* v. *Commissioners of Inland Revenue*, [1927] 2 K.B. 465.

**Received of the Midland Bank the sum of.....................five shillings at the debit of my account.**

Signed *Alice Jones*

This was to be handed to the tradesman, and presented or collected like a cheque. It is, of course, not a bill of exchange in the legal or commercial meaning of that term, but for the purposes of the Stamp Act,[1] the expression bill of exchange includes "any document or writing (except a bank note) entitling or purporting to entitle any person whether named therein or not, to payment by any other person of any sum of money." On the face of it the chequelet did not entitle a holder to any sum of money, but that was its real object, and the Court held, in a test case, that it must be stamped like a cheque.

The place and date of drawing usually appear at the top right-hand corner of the instrument. The date is made a material part of the instrument by the Bills of Exchange Act, 1882,[2] and any alteration of it makes the instrument void unless the drawer's assent is obtained. The omission of the date,[3] or the insertion of the wrong day[4] does not have this effect. The effect of altering the place of drawing is not dealt with in the Act. In some cases it would clearly be material, e.g. if a foreign city were altered to an English one, or vice versa.[5] In some cases, however, the alteration of the name of the place of drawing would not appear to alter the legal position. It is, however, important that negotiable instruments should not be altered, and it is suggested that such an alteration as is here dealt with should be regarded as *prima facie* material, i.e. that the burden of proving immateriality should be placed upon the holder.[6]

Date and place of drawing

If a cheque is wanting in any material particular (e.g. if the date is inadvertently omitted) "the person

[1] See 54 & 55 Vict., c. 39, s. 32.
[2] S. 64. (2).
[3] Bills of Exchange Act, 1882, s. 3 (4).
[4] *Ibid.*, s. 13 (2).
[5] See *Koch* v. *Dicks* (1932), 49 T.L.R. 24.
[6] See *Koch* v. *Dicks*, *supra*, where the Court of Appeal took this view.

in possession of it has *prima facie* authority to fill up the omission in any way he thinks fit,"[1] but must do so within a reasonable time.[2]

The payee

The payee must be indicated with reasonable certainty in the case of order cheques.[3] The chief difficulties which have arisen here have been caused by cheques drawn payable to fictitious or non-existing payees. Such instruments are payable to bearer;[4] the theory being that the drawer must have intended them to be payable to somebody. It is a pity that this exception was ever introduced as it has given rise to much litigation and difficulty.

Fictitious or non-existing payees

To bankers it is most important in connection with the payment of their customers' acceptances as in the leading case of *Bank of England* v. *Vagliano Brothers*,[5] since the paying bank is usually protected in case of forgeries on cheques by Sects. 60 and 80 of the Bills of Exchange Act, 1882 (see pp. 85, *et. seq.*). The rule may occasionally operate to protect a collecting bank.[6]

The various other decisions on the subsection which are not always easy to reconcile either with each other or with common sense, are fully dealt with in the leading textbooks on bills of exchange to which the student is referred. They are worthy of individual study in the reports.

Impersonal payees such as "petty cash," "wages," etc., have sometimes been considered to fall within this subsection. Cheques made payable in this way are convenient because they enable the drawer to send any member of his staff who may be available to the bank to obtain cash over the counter, and may also form part of his accounting system. Paget doubted whether these "impersonal payees," as he termed them,

[1] Bills of Exchange Act, 1882, s. 20 (1).
[2] *Griffiths* v. *Dalton*, [1940] 2 K.B. 264. It is the custom of the banks not to pay undated cheques, a practice the validity of which was doubted by Paget, but is apparently recognised in the above case.
[3] *Ibid.*, s. 7 (1).
[4] *Ibid.*, s. 7 (3).
[5] [1891] A.C. 107.
[6] See *North and South Wales Bank* v. *Macbeth*, [1908] A.C. 137, where, however, the bank ultimately failed in their contention.

could properly be considered "fictitious persons," and the Institute of Bankers advised that their use should be discouraged. It has recently been decided that while an order in this form is not a cheque at all, it is an effective mandate, and since the intention is that the money should be paid to bearer the words "or order" can be disregarded.[1] It was also held that the written words must take precedence of the printed words.

The form "Pay AB per CD" has come into use in modern times, being chiefly used to enable a bank to collect dividends for a customer. It has been questioned whether this indicates the payee with reasonable certainty and it has given rise to difficulties over the endorsement.[2]

No payee inserted

Trouble may also arise from failure to insert the name of a payee in the instrument. At first sight such an instrument would appear to be invalid under Sect. 7 (1), but it has been held that "Pay order" is the equivalent of "Pay to my order."[3] If, however, the word "or" appears before the word "order" as will be the case when a printed form is used, i.e. "Pay or order," it has been held that the instrument is bad.[4]

Order or bearer

Transferability is at the basis of negotiability. The instrument must, therefore, be in such a state that it is either payable to bearer and may thus pass from hand to hand without further formality, or must be made payable to a particular payee in such a way that he may by a mere signification on the instrument itself, viz. the endorsement, transfer his right to receive payment to some other person. This latter quality is obtained by making the instrument payable to the payee's order, and by an important provision of the Bills of Exchange Act, 1882,[5] a bill or cheque which is

[1] *North and South Insurance Corporation, Ltd.* v. *National Provincial Bank, Ltd.* (1936), 52 T.L.R. 71.

[2] See *Slingsby* v. *District Bank*, [1931] 2 K.B. 588; [1932] 1 K.B. 544 (C.A.) and Chapter V, p. 82, *post*.

[3] *Chamberlain* v. *Young*, [1893] 2 Q.B. 206.

[4] *Ibid.*, per Bowen, L.J. at p. 210, and see *R.* v. *Randall* (1811), Russ. & Ry. 195. This case, however, treats the matter from the point of view of Criminal Law, and is hardly an authority.

[5] S. 8 (4).

simply expressed to be payable to a particular person is taken to be payable to that person's order provided the instrument does not contain words prohibiting transfer or indicating an intention that it shall not be transferable. Full negotiability involves the further quality that in normal circumstances a *bona fide* transferee for value may take a good title, notwithstanding that his transferor had no title, or only a defective one. A fully negotiable instrument indicating a liability to pay on the part of reliable and obviously solvent persons is therefore, for practical business purposes, the equivalent of so much cash, and although it is not of course legal tender it forms part of the general commercial currency. Many persons using the cheque system, however, do not wish their cheques to become current; they are concerned only with the payment of particular debts or obligations. This can be achieved by destroying the second of the two qualities discussed above, leaving the instrument transferable. Alternatively even transferability may be removed from the instrument.

**Negotiable character of cheques**

The protections conferred upon the banks by the Bills of Exchange Act, 1882,[1] have made it a counsel of prudence to drawers to take steps to this end, for otherwise there is always a risk that through fraud or forgery unauthorised persons may obtain payment of cheques, with the result that the drawer may lose his money, or at the best have to take legal proceedings to recover it. The simplest method of obtaining security is to insert words in the cheque prohibiting transfer, e.g. "Pay Charles Smith only." It may be doubted whether an instrument in this form does not cease to be a cheque since the transfer of it cannot transfer any legal rights, and the bank must pay the person named and no one else.[2] It would remain a valid mandate from customer to banker. If this course be adopted by the drawer he should clearly delete the words "or order" or "or bearer" from the cheque form. If he

**Restrictions imposed on negotiability**

[1] See below, Chapters V and VI.
[2] See Bills of Exchange Act, s. 8.

does not do so, the instrument becomes self-contradictory. Such an instrument is not negotiable and not even transferable so as to make the transferee a holder who can sue upon it. The written word "only" should be given precedence over the printed words "order" or "bearer." The instrument then remains effective as a mandate; the only effect which could be given to such words being to make the instrument payable to someone as agent of the payee.[1]

## "NOT NEGOTIABLE" CHEQUES

The "not negotiable" crossing

The method usually followed, however, is that of crossing the cheque "not negotiable," i.e. of destroying the fully negotiable character of the instrument while leaving it transferable, so that a holder "shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had."[2] Such an instrument "is put on much the same footing as an overdue bill."[3] The fact that the cheque continues to be transferable is an important point often not fully appreciated.

### ILLUSTRATION

A bearer cheque crossed "not negotiable" is stolen. The thief persuades the landlord of the local public house to cash it for him, and the latter gets it collected through his own bank. The publican is liable to refund the money to the true owner, but the banks are probably protected.

Two points have been raised on the subject of "not negotiable" which have not so far been litigated: (i) whether these words have the same or any effect if they appear upon an open cheque; (ii) whether on a crossed cheque they should form part of the crossing, or may appear anywhere.

"Not negotiable" on open cheque

(i) The opinion is widely held that the words have no effect if placed on an uncrossed cheque.[4] This view is based on the fact that in the Bills of Exchange Act,

[1] *Hibernian Bank* v. *Gysim & Hanson*, [1938] 2 K.B. 384.

[2] Bills of Exchange Act, 1882, s. 81.

[3] Chalmers, *op. cit.*, p. 308.

[4] Paget, *op cit.* pp. 151–2, Slater, *Law of Bills, Cheques, and Notes*, 5th Ed., p. 168. *Byles on Bills*, 19th Ed., p. 34.

1882, the words are always mentioned in conjunction with the crossing,[1] and have no statutory effect therefore unless so appearing. It does not follow from this, however, that they have no effect at all, or even that their effect is not the same as when they appear in conjunction with a crossing. A person placing these words upon a cheque presumably intends them to have a meaning and it is difficult to see that it could be any other meaning than that given to them by Sect. 81.[2] To give them a narrower meaning would deprive them of all effect, while it would be contrary to common sense to give them a wider effect. The Bills of Exchange Act, 1882, does not profess to deal with every possible detail of the law or to crystallise it for ever. Growth is still possible. The rules of the law merchant are expressly saved and these may grow with changing needs.[3] As will be shown later, legal significance has been given to the words "account payee" appearing on a cheque though nowhere mentioned in the Act. In Paget's view the words ought to have been disregarded because they are inconsistent with the words "or order" or "or bearer." This argument would be equally applicable to crossings on cheques, and the fact that the statute nevertheless gives effect to them seems to be conclusive against it.

The question of the position of these words on a crossed cheque seems to be less difficult. It can hardly matter where they appear provided it is on the face of the instrument. Sect. 81 refers to "a crossed cheque which bears on it the words 'not negotiable,'" which might reasonably be interpreted "bears anywhere on its face."

**Effect on order cheque**

The value of these words as a safety device has perhaps been over-estimated. The thief of an "order" cheque can negotiate it only after forging an endorsement, under which, of course, the transferee cannot

[1] SS. 76, 77, and 81.

[2] Cheques were effectively crossed before the first Crossed Cheques Act. See p. 57, *post*. *Cf.* also the *ratio decidendi* in *Hibernian Bank* v. *Gysim & Hanson*, *supra*.

[3] See s. 97 (2) and *Goodwin* v. *Robarts* (1875), L.R. 10 Ex. 337.

take a title. In the event of the person who has obtained payment of a "not negotiable" cheque becoming insolvent, however, the drawer from whom it has been stolen will find himself without remedy. The drawer would, however, be protected in cases of fraud not involving forgery, and also gains the practical advantage that it is not in fact at all easy to negotiate a cheque bearing these words.

This weakness has led to the substitution or addition of the words "account payee" which for practical purposes ensure that the cheque will be collected for the account of the named payee,[1] and therefore reduces the chance of fraud to a minimum. This formula is nowhere referred to in the Bills of Exchange Act, 1882, and its effect depends on judicial interpretation. Its appearance on a cheque has been held to have no effect upon its negotiability.[2]

## CROSSINGS ON CHEQUES

Finally, a cheque may be either uncrossed ("open") or "crossed." In modern times almost all cheques by the time they reach the paying bank have been "crossed,"[3] indeed they are frequently drawn in the first instance on a form of cheque which bears a printed crossing. We have from time to time had occasion to refer to crossed cheques, and have taken for granted an elementary knowledge of their significance. The crossing may be broadly described as an instruction from the drawer to his banker that he is only to pay the instrument provided certain conditions are fulfilled. What these conditions are appears from the type of crossing used: i.e. it will either be "general" or "special." The general crossing consists of two parallel transverse lines between which are often written the words "and company" or an abbreviation thereof:[4] this is a shorthand method of instructing the **Crossings**

[1] For a fuller discussion of this crossing see Chapter VII.

[2] *National Bank* v. *Silke*, [1891] 1 Q.B. 435; but see also *House Property Co. of London* v. *London County and Westminster Bank* (1915), 84 L.J.K.B. 1846.

[3] This is done by the collecting banker for purposes of clearing.

[4] Bills of Exchange Act, 1882, s. 76 (1) (*a*) (*b*).

paying bank to pay the amount of the instrument to a banker and to a banker only. The special crossing consists in the name of a banker written across the face of the cheque, usually between two parallel transverse lines though the words of the sections do not require this:[1] this is a method of requiring the paying bank to pay the cheque to the banker whose name appears upon it, and to nobody else. As has already been mentioned, the words "not negotiable" may be added to either type of crossing.[2]

Their origin

The crossing was not deliberately invented to serve the purpose which it now fulfils. Like many valuable discoveries, it originated almost by accident. During the eighteenth century the cheque system developed to sufficiently important dimensions to necessitate the establishment of a clearing system. Payees of cheques had taken to leaving the instruments with their bankers for collection. Originally the banker had sent a clerk round to the paying bank to collect cash. As, however, the latter was probably engaged upon the same occupation, as were all the other banks in London, it was eventually found convenient for their representatives to meet at some central rendezvous and "clear" all these cheques by adding up debits and credits and striking a balance which could be paid in cash. This Clearing House has been one of the most important institutions in banking practice. It has a complicated set of rules and regulations which are somewhat outside the sphere of banking law, but to which the Courts will give effect when necessary.[3]

It was in this Clearing House that the system of crossing cheques arose, presumably for purposes of record, the name of the banker whose claim was cleared being written across the face of the cheque

[1] *Ibid.*, s. 76 (2).

[2] It will be obvious that the subject of crossings is of primary importance to paying banks and it will be discussed more in detail in Chapter V.

[3] Cf. *Parr's Bank* v. *Thomas Ashby* (1898), 14 T.L.R. 563. For an account of the Clearing House and its Rules see Grant, *op. cit.*, p. 70. The system was described as early as 1832 in *Boddington* v. *Schlencher* (1833), 4 B. & Ad. 752.

between parallel lines. Early in the nineteenth century the practice of crossing cheques had spread outside the Clearing House and it then gradually came into common use,[1] as it was realised that the requirement of presentation through a banker was a great safeguard against theft and fraud.

**Material part of cheque**

At that time, however, the Courts regarded the crossing as an informal part of the instrument, appearing upon it for purposes of convenience[2]—to tamper with a crossing was not a forgery and apparently did not avoid the instrument since it was not a material part thereof. Under the Bills of Exchange Act, 1882, any crossing authorised by the Act is a material part of the instrument, so that obliteration, addition, or alteration will make it void, unless such obliteration, addition, or alteration is authorised by the Act.[3] Such tamperings when made with intent to defraud would appear to amount to forgery under the Forgery Act, 1913.[4]

The Act expressly provides that the drawer or the holder of an open cheque may cross it generally or specially.[5] A complete system of crossings may be gradually built up, e.g. a holder of a cheque crossed generally by the drawer may cross it specially, and a later holder may add the words "not negotiable.[6] A cheque sent to a banker for collection, whether open or crossed generally, may be crossed by him specially to himself.[7]

## ISSUE, OPERATION, DISHONOUR

**Delivery necessary**

It is usually considered that a bill of exchange is completely inoperative until delivered. The Act provides[8] that "every contract on a bill, whether it be the

[1] In 1852 in *Bellamy* v. *Marjoribanks* (1852), 7 Ex. 389, its nature and origin were considered by the Court.

[2] See *Smith* v. *Union Bank of London* (1875), 1 Q.B.D. 31, which led to the passing of the Crossed Cheques Act, 1876.

SS. 64 and 78.

3 & 4 Geo. V, c. 27, S. 1 (1) (2). On the subject of forgeries in connection with cheques see Paget, *op. cit.*, Ch. XIX.

Bills of Exchange Act, 1882, s. 77 (1) (2).

*Ibid.*, s. 77 (3) (4).

*Ibid.*, s. 77 (6). As to the effect of this see p. 117, *post*.

S. 21 (1).

drawer's, acceptor's, or an endorser's, is incomplete and revocable, until delivery of the instrument in order to give effect thereto. Provided that where an acceptance is written on a bill, and the drawee gives notice to or according to the directions of the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable." Delivery means "transfer of possession, actual or constructive, from one person to another"; the first delivery to a person taking as holder being called the "issue" of the instrument.[1] When a form of bill accepted in blank was put away in a drawer by the acceptor before issue, and was stolen and filled up as a bill it was held that even a *bona fide* holder for value could not enforce it against the acceptor since there had been no delivery.[2] This is, however, somewhat at variance with an earlier case where a bill had been torn up and thrown away before issue. The pieces were picked up, pasted together, and negotiated to a *bona fide* holder who was held to take a good title.[3] The latter case has been much criticised, and may perhaps be regarded as overruled by the former. Both were decided before the Bills of Exchange Act, 1882. The proviso to Sect. 21 (2) enacts that "if the bill be in the hands of a holder in due course, a valid delivery of the bill by all parties prior to him, so as to make them liable to him is conclusively presumed." At first sight this appears to remove the necessity of actual delivery in cases where there is a holder in due course, but it is arguable that the intention is only to cure conditional or defective deliveries. This question has not yet been before the Courts.

The question whether a banker is liable if he pays a cheque drawn by his customer, but never issued is not clear. It is not necessarily governed by the same considerations, for a cheque is for the banker primarily a mandate. As a discounter of bills and cheques,

[1] *Ibid.*, s. 2.
[2] See *Baxendale* v. *Bennett* (1878), 3 Q.B.D. 525.
[3] See *Ingham* v. *Primrose* (1859), 7 C.B.N.S. 82 at p. 85.

however, the provisions of Sect. 21 are of importance to him. It has already been observed that a banker upon whom a cheque is drawn is not liable to a holder since he is not a party to the instrument, but that the drawer is the party primarily liable.[1] The drawer's liability, however, is not on all fours with that of the acceptor of a bill for his undertaking is not that he will himself pay, but that his banker will do so. By drawing the cheque he says in effect to the payee or a holder "if you present this instrument for payment at the bank on which it is drawn, and it is not paid I will pay"; that is to say the obligation depends on the fulfilment of a condition. The drawer cannot, therefore, be liable unless and until the cheque is presented and dishonoured, except in cases where presentment is excused,[2] for example if the drawer has no account at the bank on which the cheque is drawn, or no arrangement for his cheques to be met there, there is no point in presentment.[3] The fact, however, that the holder has reason to believe that the instrument will be dishonoured on presentment, as where the paying bank is insolvent, is no excuse for failure to present.[4]

Liability of parties to cheque

Drawer of cheque and acceptor of ...

Again the drawer of a cheque differs from the acceptor of a bill in that he is entitled to notice of dishonour.[5] This has been questioned, but the general provisions of the Act apply to cheques unless otherwise declared. Notice of dishonour is seldom necessary in practice as it is excused in the following cases: (i) where the drawee is as between himself and the drawer under no obligation to pay the bill, e.g. absence of funds, and (ii) where the drawer has countermanded payment.[6]

Drawer entitled to notice of dishonour

Endorsements

A true endorsement is a signature by or on behalf of a payee or endorsee made with the intention of passing the property in the instrument or, in the case of accommodation parties of making himself liable for the

[1] See p. 43, *ante*. He may sometimes become liable in tort.
[2] See Bills of Exchange Act, 1882, s. 46 (2).
[3] *Ibid.*, s. 46 (2) (*c*), and see *Wirth* v. *Austin* (1875), L.R. 10 C.P. 689.
[4] *Ibid.*, s. 46 (2) (*a*).
[5] See Bills of Exchange Act, 1882, s. 48, and cf. *May* v. *Chidley*, [1894] 1 Q.B. 451.
[6] *Ibid.*, s. 50 (2) (*c*), (4), (5).

payment thereof. Cheques are not as a rule endorsed in this way, since the payee usually himself presents the instrument for payment either personally or through his bank. Actually, of course, in such cases the payee does place his signature on the back of the instrument, but he does so by way of acknowledgment or receipt. This is not an endorsement within the meaning of the Act.[1] The question whether the paying bank is entitled to insist on an endorsement of this type is considered in Chapter V.

**Notice of dishonour to endorser**

The holder of a cheque is, of course, entitled to hold an endorser liable if the cheque is dishonoured, and in such cases notice of dishonour should always be given, as it will only very exceptionally be excused.[2] If due notice is not given the endorser's obligation to pay is discharged.[3] The rules relating to the giving of notice are common to bills and cheques. They are set out in Sect. 49 of the Bills of Exchange Act, and the student should already be familiar with them. Sub-sects. 12 and 13 of Sect. 49 should be particularly noted in the case of cheques. They deal respectively with the time within which the notice must be given, and the position where the dishonoured instrument is in the hands of an agent. This last rule is particularly important to collecting banks and will be further considered in Chapter VI.

**Noting and protest**

It is not necessary and would be unusual to note an inland cheque for non-payment, though the Act makes provision for it,[4] but a foreign cheque must be duly protested for non-payment. If not, the drawer and endorsers are discharged unless the instrument does not on the face of it appear to be foreign.[5] "It is no part of the definition of a cheque that it should be an inland bill,"[6] and it will from time to time happen that a British bank will have to handle a foreign cheque.

[1] See s. 2 and s. 8 (3); also *Keene* v. *Beard* (1860), 8 C.B.N.S. 372 at p. 382.
[2] Bills of Exchange Act, 1882, s. 50 (2).
[3] *Ibid.*, s. 48.
[4] *Ibid.*, s. 51 (1).
[5] *Ibid.*, s. 51 (2).
[6] Chalmers, *op. cit.*, p. 289.

This will commonly occur when a customer, who is abroad, draws a cheque on his bank in England or when a foreign correspondent draws a cheque on his English principal; these are "foreign" cheques.[1] If the customer using his own cheque book does not insert the place of drawing, the instrument will appear to have been drawn in the British Isles and the holder may treat it as an inland cheque.[2] It may appear that the endorsements or some of them are foreign. In such cases protest is not technically required since foreign endorsements do not alter the character of the instrument, but it is in fact advisable, as it may be necessary to sue the endorsees abroad, and the formal protest may then facilitate the proceedings.

A protest is a formal document drawn up and executed by a notary public, an officer recognised by the Courts in all civilised countries, and whose "acts" are accordingly accepted in all such Courts. If a foreign cheque or bill is dishonoured, it should be taken to a notary who should be instructed to present it again. When it is again dishonoured he will make a "note" on a slip of paper, setting out the answer given by the party dishonouring the instrument, as "no effects" or "no advice." This is called "noting"; the note being initialed by the notary and attached to the instrument. At the same time a copy of the note is entered in the notary's register, together with an identification mark placed on the instrument. The notary then draws up his formal "act of honour" testifying that he presented the instrument on such and such a date and received the answer "no effects" or as the case may be, and "protesting" such dishonour and holding all the parties to the instrument liable for the amount, the costs, and damages. If the services of a notary cannot be obtained at the place of dishonour, any householder or substantial resident may certify to the same effect in the presence of two witnesses.[3]

Protest

[1] See Bills of Exchange Act, 1882, s. 4 (1). [2] *Ibid.*, s. 4 (2).
[3] See Bills of Exchange Act, 1882, ss. 51, 94 and Schedule I.

# CHAPTER V

## PAYING THE CUSTOMER'S CHEQUES

As we have seen, a banker borrows money from his customer on the terms that he must repay it to him, or at his order, against the presentation of a mandate, or cheque, to that effect. Two main subjects for discussion arise upon this: (*a*) whether at the time when the cheque is presented the banker is under the liability to pay the amount for which it is drawn; (*b*) whether he is liable to pay upon that particular cheque; in other words, is the cheque in order?

**Banker's obligation to pay**

The banker's obligation to pay cheques depends in the first place on certain general considerations, of which the most obvious and fundamental is that the relationship of banker and customer must still be in existence: the question of its termination, however, requires separate treatment.[1]

**Relationship must still exist**

Again the banker is entitled to refuse payment if he has been ordered to do so by a Court of competent jurisdiction. It may be that some third party, claiming that the money paid into the account does not belong to the customer or is held by him in trust, has obtained an injunction restraining the banker from paying it away.[2] Disobedience to such an order would be a contempt of Court, and the banker would run grave risk of becoming liable to the party obtaining the injunction for the amount paid away.

**Injunction restraining payment**

### GARNISHEE PROCEEDINGS

A more likely case, however, is that of a third party who has obtained judgment against the customer, obtaining an order from the Court by which the balance of his account at his bank is attached for the purpose of paying the amount of the judgment debt. The procedure for obtaining such an order, which is called

**Attachment of balance under Court order**

[1] See Chapter XII.    [2] See e.g. p. 179, *post*.

technically a garnishee order, is of some importance to bankers and calls for discussion. It is governed by Order XLV, r. 1, of the Rules of the Supreme Court of Justice under which money owing from third parties to a judgment debtor can be made available to satisfy the judgment against him.

**ILLUSTRATION**

A has obtained judgment against B for £100 and C owes £200 to B. C may be ordered by the Court to pay over £100 to A instead of to B.

The steps which are normally followed in garnishee proceedings may be summarised as follows—

A, the judgment creditor, swears an affidavit in which he sets out that there is a judgment or order of the Court in his favour against B, the judgment debtor, which is still unsatisfied and amounts to £X, and that C, who is called the garnishee, is indebted to B and is within the jurisdiction of the Court. He next applies to the Court on the strength of this affidavit for an order that "all debts owing or accruing from C shall be attached to answer the judgment or order" against B. The Court will then make an order that C shall show cause why he should not pay the money, which he owes to B, to A and *unless* (*nisi*) he is able to do so will make a final order that he shall pay over so much of the debt to A as will satisfy his judgment order. A payment into Court, or to the judgment creditor A, under such an order operates as a full and final discharge of C's debt to B *pro tanto*. The first of these orders is called a garnishee order *nisi* and the final order a garnishee order absolute. The procedure which has just been described is that existing in the High Court, but in the County Court there is a procedure which is substantially similar, originated by means of a summons served on C and calling upon him to show cause why he should not make payment to A.

It would appear at first sight that the customer's balance at his bank, being, as we have seen, simply a debt due to the customer from the banker, could be

attached by a judgment creditor in this way. By the words of Order XLV, r. 1, however, only "debts owing or accruing due" from a third party to the debtor can be attached, and the question was raised in the *Joachimson Case*[1] whether the banker's debt to his customer can properly be regarded as "owing or accruing due" until after the demand has been made. The money is clearly not due until the demand has been made, and "accruing due" is usually considered to mean automatically falling due upon some future date, e.g. a debt which is repayable by instalments. If, however, the creditor has to fulfil some condition before the debt is payable, it is not regarded as accruing due until the condition in question has been complied with.[2] The service of the garnishee order *nisi* upon the bank operates in law, however, as a demand made in the customer's name,[3] and the balance can therefore be attached. This view of the operation of the garnishee order *nisi* has been attacked by Paget[4] on the ground that the order *nisi* ought never to issue unless the debt is already accruing due, which *ex hypothesi* it is not until the order *nisi* has been served on the banker. Although this may be logically sound, it is clearly only just that when a judgment debtor has a balance at his bank, it should be made available easily to satisfy the judgment creditor, and the procedure of the garnishee order is very much the most convenient way of attaining that object.

Where, however, anything more than a demand is necessary before the debt accrues due it would appear that the balance cannot be garnisheed. In the case of deposit accounts,[5] the usual terms of borrowing by the banker are that notice must be given of intention to withdraw and the deposit receipt or book be returned to the bank. A balance on deposit on such terms

[1] [1921] 3 K.B. 110, and see p. 24, *ante*.
[2] See *Heppenstall* v. *Jackson* (*Barclay's Bank, Ltd., garnishee*), [1939] 1 K.B. 585.
[3] Bankes and Warrington, L.JJ., in the *Joachimson Case, supra*.
[4] *Op. cit.*, p. 30.
[5] See Chapter VIII.

cannot therefore be garnisheed, and although there appears to be no reported case in the High Court to this effect, numerous decisions have been so given in the County Courts. Deposits are sometimes accepted, payable on demand, and such are presumably attachable on the principle of the *Joachimson* judgments.[1] Again, deposits are sometimes accepted repayable after receipt of a certain period of notice, e.g. seven days. Such cases might give rise to difficulty since it could be argued that the service of the order *nisi* operates as the necessary notice, and the question would then arise whether the banker should honour his customer's demands for payment in the meantime. It is the writer's opinion that he could do so, but the position is by no means clear. Again, balances held at foreign branches of the bank are not to be regarded as "debts due or accruing due" within the jurisdiction.[2]

The usual form of order *nisi* attaches the whole of the debt "due or accruing due" from the third party to the judgment debtor, and the bank therefore cannot safely honour any of its customer's cheques after receipt of the notice, even if there is reason to suppose that the amount of the judgment debt is less than the balance of the account. Were evidence to the latter effect to be produced to the bank manager, he might perhaps exercise his discretion and allow the account to be drawn on.

### ILLUSTRATION. ROGERS *v.* WHITELEY[3]

Rogers had an account at the banking department of Whiteley's which was in credit £6800. Judgment was given against him for £6000 in an action and the judgment creditor obtained a garnishee order *nisi* ordering that "all debts owing or accruing due" from Rogers should be attached to answer the sum of £6000. This order was served on Whiteley's. Afterwards various small cheques for sums totalling less than £800 were presented for payment, which was refused. Rogers accordingly sued Whiteley's for damages for wrongful dishonour of his cheques.

[1] *Supra.*
[2] *Richardson* v. *Richardson,* [1927], P 228.
[3] [1892] A.C. 118.

*Held:* That the order attached the whole of the moneys in the account and that the garnishee was entitled therefore to refuse payment of the cheques.

Moneys paid into the account after service of the order *nisi* are clearly not attached by it. The old account should therefore be ruled off and a new one opened, to which all such moneys may be credited and out of which cheques subsequently presented should be paid. It would not appear that there is any legal duty on the bank to adopt this course, but it is clearly expedient that it should do so. The customer should naturally be informed of what has happened.

Again, the order has no conclusive operation until it is made absolute, so that no payment should be made to the judgment creditor in the interval.

The form of order *nisi* used mentions a date and time when the garnishee may appear before the Court. This is to give him the opportunity of putting forward any reason why the money should not be paid over to the judgment creditor. If there are no such reasons he may appear and pay the money into Court less the costs to which he has been put. When the bank desires to take objection, the matters on which it is founded should be sworn to in an affidavit and brought to the notice of the Court at the hearing. The following are the types of facts most likely to arise—

(*a*) The account may be overdrawn; this causes no difficulty.

(*b*) The amount of the balance, or part of it, may have been assigned by the customer to a third party and notice given to the bank. If this be so, and the assignment be genuine, the amount assigned has ceased to be the property of the customer as from the date when the assignee had notice and cannot therefore be attached.[1] An assignment under the Law of Property Act, 1925, Sect. 36 (1), is not effective until the time when notice is received by the debtor. If, therefore, notice of the garnishee order is received by

[1] See *Rekstin* v. *Severo Sibirsko etc*, [1933] 1 K.B. 47, and p. 35, *ante*.

him first it will take precedence of the assignment. The assignment, however, may be a good equitable assignment; in which case it will be binding on the debtor in equity notwithstanding the prior notice of a garnishee order, provided the assignment was in fact prior to the latter, and provided of course the garnishee order *nisi* has not been made absolute.[1] The drawing of a cheque does not amount to an assignment,[2] and a cheque drawn previously to the date of the garnishee order *nisi* should not therefore be honoured.

(*c*) The bank may be entitled to set off a debt due to itself at the time of the order *nisi* against the amount of the balance, but this must be a liquidated amount, i.e. a known or calculable sum, and not merely in the nature of a general counter-claim.[3]

(*d*) The balance may not belong to the customer in his own right, e.g. the account may be a trust account. In this case the judgment debtor clearly has no title to the money, and if the bank is aware of the position it would appear to be its duty to bring the matter to the attention of the Court.

**ILLUSTRATION. HANCOCK *v.* SMITH**[4]

The plaintiff was judgment creditor of the defendant, a stockbroker. He obtained a garnishee order *nisi* on the defendant's bank balance. All the money in the account was clients' money, though if the Rule in Clayton's case applied[5] it would not have been possible for certain clients to establish their rights.

*Held:* That as no part of the moneys in the bank belonged to the debtor, the judgment creditor had no right to any of it. The Rule in Clayton's case could only be applied in case of conflict between the clients.

Yet so long as the order stands the bank is entitled not to pay cheques drawn on the trust account.[6]

(*e*) The debt garnisheed must belong to the judgment

[1] *Holt* v. *Heatherfield Trust, Ltd., and Another,* [1942] 1 All E.R. 404.
[2] See p. 34, *ante.*
[3] See *Tapp* v. *Jones* (1875), L.R. 10 Q.B. 591.
[4] (1889), 41 Ch.D. 456. [5] See p. 168.
[6] *Plunkett* v. *Barclays Bank Ltd.,* [1936] 2 K.B. 107.

debtor alone so that if it is due on a joint account it cannot be attached.[1]

(*f*) The judgment debtor may be wrongly described in the order *nisi*. This is an important point. The bank is entitled to be certain beyond a peradventure that it is the customer's account which is being attached, because if the customer's cheques are dishonoured the position will be serious. It may, therefore, disregard any order which may describe the customer inaccurately, e.g. as by a wrong Christian name.[2]

(*g*) The order attaches *prima facie* to the amount of the balance as it stands in the books of the bank, e.g. to cheques uncleared but credited.[3] This is a question of intention however, as the crediting may be for convenience and is not necessarily conclusive that the bank has constituted itself a holder of the instruments.[4]

(*h*) The balance may not be accruing due, as in the case of the usual deposit account already discussed.

## OTHER CONDITIONS OF LIABILITY

**Account must be in credit**

A further obvious condition of the banker's liability is that the customer's account must be in credit. There is, however, the important difference that if he pays a cheque after the relationship has terminated, he may well not be able to recover the money, while if the payment of the cheque leads to an overdraft the banker is entitled to be put in funds. The account is to be regarded as in credit if there is a balance in the customer's favour or an agreement by the banker to allow an overdraft. If the customer has more than one current account, and draws cheques upon an account which is not sufficiently in funds to meet it, it would appear that the banker may, if he chooses, combine the two accounts. The cases on combination of accounts

[1] *Macdonald* v. *Tacquah Gold Mines Co.* (1884), 13 Q.B.D. 535. and *Hirschorn & Evans (Barclays Bank garnishee)*, [1938] 2 K.B. 801, and contrast *Harrods Ltd.* v. *Tester* (1937), 157 L.T. 7, where a husband proved that a joint account was really his. See Chap. IX.

[2] *Moore* v. *Peachey* (1892), 8 T.L.R. 406.

[3] *Jones & Co.* v. *Coventry*, [1909] 2 K.B. 1029.

[4] *Underwood* v. *Barclays Bank*, [1924] 1 K.B. 775, and see below, p. 115.

are all cases where the banks have done this for their own advantage,[1] but there appears to be no reason why the same should not be done in all cases unless the customer indicates that it is not his wish. It might, however, be considered that the drawing of a cheque upon a particular account amounts to such an indication. Conversely, if the customer has more than one current account and draws a cheque generally, the banker would appear to be under the obligation to combine them if necessary.[2]

Further it is clear that the customer is only entitled to have his cheque paid at the branch at which he keeps his account.

Cheque to be presented at branch where account kept

**ILLUSTRATION. WOODLAND *v.* FEAR**[3]

One, Helyar, had an account at the Glastonbury branch of Stuckey's Bank (a local Somerset bank of the time). He owed the defendant £39 and gave him a cheque for that sum drawn on Glastonbury. The defendant lived near Bridgwater, and therefore presented it at a branch of the bank in that town where he received payment. When the cheque was sent through to Glastonbury it was found that there were no assets. The plaintiff was the officer in those days appointed to represent the bank, and he brought the action to recover the money paid to the defendant on the cheque.

*Held:* The Bridgwater branch were not bound to honour Helyar's cheques, and could not be considered to have paid this cheque as his bankers. They had rather been acting as the defendant's agents to collect, and having failed to do so, owing to the drawer's lack of assets, they were entitled to be repaid the money which they had in effect advanced.

An interesting consequence of this rule is that if a customer draws a cheque upon a branch where his account is not sufficiently in funds he is not entitled

[1] See Chapter XI, p. 227 for further discussion.

[2] There appears to be no decision on this point, though a statement of Swift, J., in *Greenhalgh* v. *Union Bank of Manchester*, [1924] 2 K.B. 153, is sometimes referred to. He said that "a banker has no right without the consent of his customer to move either assets or liabilities from one account to another." This statement, however, was made in a case which had nothing to do with honouring cheques, and should not be read out of its context.

[3] (1857), 7 E. & B. 519; and see per Atkin, L.J., in *Joachimson* v. *Swiss Bank Corporation*, [1921] 3 K.B. 110 at p. 127.

to have the accounts at other branches combined so as to provide for payment.[1]

The cheque should be presented for payment in business hours, otherwise it would appear that the bank is under no obligation to pay it. (*Cf.* Atkin, L.J.'s, judgment in *Joachimson* v. *Swiss Bank*.)[2] It is not, however, a breach of duty on the part of the bank to pay after business hours, at any rate if payment is made within a few minutes of closing time.[3]

**Funds for whole amount of cheque**

The banker is under no obligation to pay part of the sum for which a cheque is drawn in a case where the account is not sufficiently in funds to pay the whole. Indeed it is very doubtful whether he can properly do so: the mandate is for a specific sum, and the payment of any other sum is *prima facie* not in accordance therewith. It may be argued, however, that the mandate may be read as meaning "pay £x or such smaller sum as may be to my credit," and if there is a genuine ambiguity, the banker is entitled to his own interpretation.[4] It may be doubted whether there is a real ambiguity in such a case. The banker may, however, pay the whole amount as ordered, and debit his customer with the difference.

The question has been much discussed whether the holder on being informed that the assets are insufficient can pay the amount of the deficiency into the drawer's account and present the cheque again.[5] It is difficult to see how, in the normal case, the holder could ascertain the amount of the deficiency without a breach of confidence on the part of the banker.[6] Apart from this

[1] As to the position of the branches in relation to each other and head office, see p. 299, *post*.

[2] [1921], 3 K.B. 110 at p. 127.

[3] See *Baines* v. *National Provincial Bank* (1927), 32 Com. Cas. 216, where the cheque was presented and paid at 3.5 p.m., the bank normally closing at 3 p.m.

[4] See p. 74, *post*, where the matter of ambiguous instructions is more fully discussed.

[5] See opinion to this effect in *Questions on Banking Practice*, published by the Bankers' Institute, 7th ed., Q. 490.

[6] See *Tournier* v. *National Provincial Bank*, [1924] 1 K.B. 461 and Chapter III, p. 17, *ante*, and *Foster* v. *Bank of London* (1862), 3 F. & F. 214, where in circumstances of this type it was held that the bank had no right to communicate the state of the account.

it is not clear that any authority can be implied in a banker to accept gifts on his customer's behalf, although exceptionally he might do so from an accredited agent.

**ILLUSTRATION. RECKITT v. NUNBURNHOLME[1]**

T was the defendant's solicitor. He obtained from her a cheque for £5000 made payable to himself. He knew from his own knowledge that her account was overdrawn, so he paid in a cheque for a large amount drawn fraudulently on the plaintiff's banking account over which he had a power of attorney. He then presented the defendant's cheque, and received payment. The plaintiff sued the defendant to recover the money, and succeeded. It was held that the defendant's bank were her agents to receive money from her solicitor.

**Account actually in credit**

The account must be in credit, so that if the banker has received funds which he has not had time in the ordinary routine of business to place to the credit of the account he is not liable for dishonouring cheques which can only be met with the use of such funds.[2] Usually, when his cheques are outstanding, a customer paying in funds will make arrangements for them to be immediately available. Moreover, if the funds paid in are not in the form of legal tender but are negotiable securities such as cheques, as will commonly be the case, the banker must have time both to collect and credit the amounts. If the amount, e.g. of cheques paid in, is once credited to the account it becomes available, in the absence of any indication to the contrary, to be drawn upon by the customer notwithstanding the cheques have not been cleared,[3] and remains available until the account be altered, e.g. by a debit entry after the dishonour of the cheques in question.[4]

A practical problem of some difficulty which may arise when the credit balance is small is concerned

[1] (1929), 45 T.L.R. 629.

[2] See *Marzetti* v. *Williams* (1830), 1 B. and Ad. 415 at p. 424, "within a reasonable time after they receive the money."

[3] *Capital and Counties Bank* v. *Gordon*, [1903] A.C. 240, at p. 249, and see p. 136, *post*.

[4] Paget thinks that the law on this point is doubtful; 4th Ed., p. 189.

Simultaneous presentment of cheques

with the order of payment of cheques simultaneously presented at the clearing. No rule has been established by the Courts for dealing with such a situation, and it does not appear that any settled practice is followed by the banks. Clearly, any cheques for sums greater than the balance can be disregarded, and in dealing with the others, probably the simplest plan is to pay them in the order they come to hand until there are not sufficient funds to pay the smallest one left. Some bankers, however, pay the largest cheques first, and others as many small ones as possible.[1] In the event of the customer complaining, the banker could possibly contend that as his instructions were ambiguous he was entitled to exercise a reasonable discretion.[2] It is, however, questionable whether a person in receipt of instructions which he realises to be ambiguous is entitled to act upon his own interpretation of them, at any rate if it is reasonably possible to communicate with the giver of them, and it may be that the only safe course to pursue is to inquire of the customer as to the order in which he desires to have the cheques paid.

## OBEDIENCE TO TERMS OF MANDATE

Is particular cheque in order?

The second main question of whether the banker is entitled to pay a particular cheque raises some of the most difficult practical problems of banking law, and requires detailed discussion. The cheque contains the terms of the customer's order, usually simple enough, and it is a primary and fundamental obligation of the bank to obey the terms of this mandate exactly as they are given. On making a payment in accordance with the customer's mandate the banker has discharged his debt to that extent, and debits the account with the amount, but it is a condition of his right to do so that he should have obeyed the order exactly. At Common Law there seem to have been no exceptions to the

Importance of obedience to mandate

[1] See Paget, *op. cit.*, 185; Minty, *Law Relating to Banking and Foreign Exchange*, 2nd Ed., p. 173.

[2] See *Westminster Bank* v. *Hilton* (1926), 43 T.L.R. 124, and p. 74, *post*.

application of this principle, but under the Bills of Exchange Act, 1882, the position has been modified in two very important particulars, viz.

(i) when payment is made to a holder who has taken under a forged endorsement, and

(ii) in certain cases where payment of a crossed cheque is made in accordance with the crossing, and other requirements of the statute. These two cases require careful examination,[1] but it is important to realise that apart from them the paying banker's duty to carry out the terms of the mandate is absolute, and that if he fails to do so, however high a standard of care he may have displayed, his right to debit the account is lost.

Material parts of instrument

If the form of cheque which was discussed in some detail in Chapter IV be looked at, it will be seen that the most obvious terms of the order are that the bank should pay a fixed sum, viz. £1000 to Alfred Jones or to his order. The cheque also bears the drawer's signature, and a date and place of drawing which are not part of the order, but are material parts of the instrument.

As far as the order itself is concerned, therefore, the banker can only go wrong in one or other of two ways, viz. (*a*) by not paying the correct amount, or (*b*) by not paying it to the payee or proper holder.

Incorrect amount

As to the amount, it is unlikely that any error will occur over this in cases where the cheque is presented for payment in the same condition as it left the drawer. Should there be one, the bank are clearly not entitled to debit the account except possibly in the case of writing and figures being so badly made that it was reasonably possible to misread them. But if the writing is as illegible as this, it should almost certainly strike the cashier that the order is not clear, and his duty is then to refer the instrument to the drawer; there is no obligation to pay an obviously ambiguous mandate, rather the reverse.[2]

[1] See p. 86 and p. 101, *et seq.*, *post.*
[2] Cf. *London Joint Stock Bank* v. *McMillan*, [1918] A C 777 Paget, *op. cit.*, p. 181, suggests the proper answer as "cheque irregular, requires confirmation."

The question of ambiguity in the mandate is a very important one. It is a principle of the law of agency that when an agent receives instructions which are reasonably capable of more than one meaning and *bona fide* takes action thereon, he will not be liable for breach of duty though the action actually taken was contrary to the intentions of the principal.[1] This principle is applicable to instructions given to bankers.[2] It would appear, however, that if the ambiguity is obvious, or appreciated by the mandatory it is his duty to ask for further instructions, though he may be justified in acting upon his own interpretation in an emergency. This principle could only protect the bank in the unlikely event of both words and figure reasonably appearing to indicate some amount different from that intended by the drawer.

Ambiguity

## ALTERATION OF CHEQUES

There remain the cases where the cheque is altered between drawing and presentation. This may occur in the following ways—

(i) the spaces for words and figures may have been left blank by the drawer and subsequently filled in;

(ii) the words and figures may have been filled into the appropriate spaces in such a way as to leave room for the insertion of further words and figures, and such words and figures may actually have been inserted so that the amount of the original drawing will have been altered;

(iii) the words and figures may themselves have been altered, no doubt in order to increase the amount of the original drawing.

Blank cheques

(i) This case does not cause much difficulty. Sect. 20 (1) of the Act gives the person in possession "*prima facie* authority to fill up the omission in any way he thinks fit," and it has never been suggested that a banker acting honestly in paying such an instrument

[1] *Ireland* v. *Livingston* (1872), L.R. 5 H.L. 395.
[2] *Westminster Bank* v. *Hilton* (1926), 43 T.L.R. 124—it has already been referred to earlier in this Chapter.

is not entitled to debit his customer with the amount, notwithstanding that the cheque has actually been filled in contrary to the instructions of the drawer. The drawer would in such a case be estopped from denying that the terms of the mandate as presented were his own.[1] The considerable difficulties which may beset holders of instruments originally issued in an incorrect form do not affect the paying bank.[2]

(ii) The case of the instrument drawn with gaps so that it can be altered without any actual tampering with the writing upon it has caused difficulty. It is now clear that if gaps are left in the spaces provided for the insertion of the words and figures indicating the amount of the draft, and if into these gaps further words and figures are inserted so as to raise the amount of the order, and if when the instrument has been so altered a reasonably careful cashier would not notice that it had been tampered with, the bank, on payment of the amount as altered, are entitled to debit the customer's account therewith. **Carelessly drawn cheques**

**ILLUSTRATION. LONDON JOINT STOCK BANK v. McMILLAN[3]**

McMillan and Arthur were a firm of stockbrokers and were customers of the London Joint Stock Bank. A confidential clerk, part of whose duties was to prepare cheques for signature, drew a cheque payable to the firm or bearer leaving a blank in the space for the words of the amount, and in the space for the figures the numbers 2 : 0 : 0 with a gap between the £ symbol and the 2, and between the 2 and the first 0. He obtained the signature of one of the partners to this instrument and then added the words "one hundred and twenty pounds" in writing, and altered the 2 to read 120 by inserting a 1 and a 0 on either side of the 2. He then presented the cheque at the bank and received £120 over the counter. The firm's account was debited with this amount to which they raised objection.

[1] Cf. *London Joint Stock Bank* v. *McMillan*, [1918] A.C. 777 per Lord Finlay at p. 881 "if a customer signs a cheque in blank, and leaves it to a clerk or other person to fill it up, he is bound by the instrument as filled up by his agent."

[2] E.g. *Lloyds Bank* v. *Cooke*, [1907] 1 K.B. 794; *Smith* v. *Prosser*, [1907] 2 K.B. 735.

[3] [1918] A.C. 777.

*Held* by the House of Lords that the customer must bear the loss and that the item was properly debited.

This decision, one of the most important in the history of banking law, was rested upon two main principles. The one, which seems to have been favoured by the majority of the lords, that the customer owes to his banker a duty to exercise reasonable care in drawing up his mandate to his banker, and to prepare it in such a way as to safeguard the banker from being imposed upon by the addition of extra words or figures; the other on the principle that the drawer was estopped in the circumstances from denying that he had authorised the filling up of the blank spaces in the cheque in the way they actually were filled up. The duty imposed under the former principle is capable of wide application, although so far it has not been much used,[1] and seems to mark a fresh development of the law, as there is no similar duty on the drawer of an ordinary bill of exchange.[2] Dr. Hart, however, contends[3] that the decision is really founded on the estoppel, and involves no new departure,[4] a view, however, which is not generally shared, for even he admits that two out of the five law lords who took part in the decision were expressly against his view.

In *Greenwood* v. *Martins Bank*,[5] Scrutton, L.J., discusses the scope of the decision in the *McMillan Case*, and expresses the important opinion that it establishes that there is "a continuing duty on either

[1] It was unsuccessfully invoked in *Slingsby* v. *District Bank*, [1931] 2 K.B. 588, when an empty space had been left between the name of the payee and the words "or order" of which a fraudulent solicitor took advantage to insert the words "per Cumberbirch & Potts" (the name of his firm) as a result of which he was able to obtain payment of the cheque. It was held, however, that the form of words "Pay AB per CD" (as to which see *post*, p. 82) which was unknown to the drawer was not in sufficiently common use to make it unreasonable or negligent conduct to leave such a space as the drawer had left in this case.

[2] See *Scholfield* v. *Londesborough*, [1896] A.C. 514.

[3] *Op. cit.*, 4th Ed., pp. 384, *et seq.*

[4] There was a much earlier case, *Young* v. *Grote* (1827), 4 Bing. 253, to the same effect, but this had generally been regarded as wrongly decided.

[5] [1932] 1 K.B. 371 at p. 381.

side to act with reasonable care to ensure the proper working of the account."

Alteration in words and figures

(iii) Where the words and figures are actually altered, usually, of course, so as to increase the amount of the order, it is clear that the banker is not entitled to debit the customer's account with the money paid away. The mandate was to pay a certain sum of money, and the banker has paid a different sum; the fact that no reasonable inspection could have revealed the alteration does not therefore help him.[1] It would appear also that he cannot even debit the customer with the original amount of the cheque. An order to pay a certain sum, e.g. £7, is an order to pay that sum only, and is not carried out by paying a different sum, say £77. Again the words and figures specifying the amount to be paid are clearly a material part of the cheque, and their alteration therefore avoids the instrument.[2] If the cheque is void as a bill of exchange, it is arguable that it is also void as a mandate as from the time of the alteration, though it is possible in theory to distinguish between its functions as a negotiable instrument, and as an order on a banker. It is true that when the alteration is not apparent, a holder in due course may enforce payment according to the original tenor of the instrument,[3] but this preservation of rights to a third party would not appear to confer any protection upon the banker.

## ENDORSEMENTS

Failure to pay proper person

In the case of an order cheque failure to make the payment to the payee or endorsee will only arise in practice where there is some irregularity in the endorsement. This is so because the banker will not pay the payee of a cheque, even if he be the drawer himself, without obtaining an endorsement. On the face of it this practice requires legal justification. The

[1] It is, however, possible that even in such cases the question of negligence by the drawer may arise, e.g. if he fills in words and numerals in pencil.

[2] Bills of Exchange Act, 1882, S. 64 (1).

[3] See proviso to S. 64 (1), *supra*.

Meaning of endorsement

primary object of an endorsement is the transfer of the instrument, and there is no object in a payee who himself requires payment giving an endorsement. This endorsement no doubt operates as a receipt, and the banker is entitled to have a receipt, though whether he can require to have it endorsed upon the cheque is another matter, which is discussed more fully below.[1]

If the instrument is payable to bearer, the banker is clearly entitled to pay any bearer provided he act in good faith.

Irregularity in endorsement may occur (i) through a payee failing to endorse correctly, or (ii) through an apparently regular endorsement being forged or attached without authority.

Irregular Endorsements

(i) It is very easy to make a mistake over the endorsement, and if the banker pay a cheque upon an irregular endorsement he will be unable to rely upon the protection given by the Act (i.e. Sects. 60 and 80). Should payment be made to the persons actually entitled, it would appear that the drawer's account can be properly debited despite the irregularity—slight mistakes are queried by the paying bank with the collecting bank which then re-presents the cheque with its own confirmation, and notifies its customer of its action. In view of the possibility of fraud, however, it is clearly of the greatest importance that the cashier of the paying bank should take great care, and observe the requirements of the law. The endorsement must, of course, be written on the bill itself,[2] though writing would appear to include printing provided this is duly authenticated, e.g. where a company's endorsement is made by means of a rubber stamp. Irregularities may arise in a number of ways, and are most commonly caused by inadequate or erroneous descriptions of the payee, or by signatures appended on behalf of payees, particularly in cases where the payee is a corporation for whom some natural person is signing. The requisites of a valid endorsement are given in Sect. 32 of the

[1] See p. 103, *post*.
[2] Bills of Exchange Act, 1882, s. 32 (1).

statute, which should be referred to. The possible cases of difficulty are very numerous, and exhaustive sets of illustrations are given by some of the textbook writers.[1] Most of the banks issue detailed instructions to their cashiers on this subject, but it is believed that in practice there is some variation in the standards adopted, and in the absence of authority it is not always possible to be sure of the correct position. The statements made in some textbooks are too dogmatic since they reflect only the opinions of the authors, sometimes no doubt fortified by banking practice. If there is any reasonable doubt as to the regularity of an endorsement, the proper course is to refer to drawer.

It is only possible in an introductory work to deal with the principles of the matter supported by illustration.

Faulty descriptions

In the first place it is possible that no payee at all is named in the cheque. At first sight an instrument in such a form would appear to be altogether irregular. This is not so, however, because if made payable to order it is the same as if it were made payable to the drawer's order,[2] and the drawer's endorsement will be effective for negotiation. On the other hand there is authority[3] for the statement that "Pay or order" is defective because of the absence of a payee. The bank could safely refuse to pay an instrument in this form until the blank had been filled in—Sect. 20 of the Act gives authority for the person in possession to fill in the omission.

Where the instrument is made payable to an impersonal payee as "Cash or order" it is not strictly a cheque.[4]

It is essential that the endorsement should correspond exactly with the description of the payee in the body

[1] See L. M. Minty, *Law Relating to Banking and Foreign Exchange*, 2nd Ed., pp. 192–8; also *Questions in Banking Practice*, 7th Ed., Qs. 852–6—several opinions of Sir John Paget are given.

[2] *Chamberlain* v. *Young*, [1893] 2 Q.B. 206.

[3] See *R.* v. *Randall* (1811), Russ. & Ry. 195, an old criminal case, and perhaps questionable now, at any rate in this connection. See Chapter IV, p. 51, note 3.

[4] See Chapter IV, p. 50, *ante*.

of the instrument, except that unessential parts of the description need not appear in the endorsement, e.g. Mr. Jones, Professor Brown, and Major Robinson should endorse by means of their ordinary signatures.[1] The rules are often stated[2] in a very exaggerated form, and even some of Paget's own statements are open to question, e.g. that the endorsement "General CD" should be rejected.[3] The above section, which uses the word "sufficient," does not require such rejection, nor in the writer's opinion does a signature cease to be a signature because it has added to it the designation of the person signing. Initials, however, are, save in the case of peers (there being no exact duplication of titles), essential to a signature. If the payee be wrongly designated, as by erroneous initials, or his name be misspelt, the section seems to require (it uses the word "may") that he should sign as described though he may add his proper signature, and this is usually stated to be the correct course.[4] Unless the banker knows the endorser, it is always sufficient if the endorsement corresponds with the designation of the payee in the body of the instrument; questions only arise when there is a discrepancy. A payee described by an initial may properly sign with his Christian name provided it fits in with the initial. The application of the rule to married women may at first sight cause difficulty. Mrs. John Brown can hardly sign "John Brown" though it is arguable that she can do so under Sect. 34 (4), adding her own signature if she thinks fit. Her own signature by itself is not sufficient to connect her with John Brown's wife, and she should therefore add to her signature the words "wife of John Brown" or some other indication of the relationship.

**Representative signatures**

The majority of problems, however, arise from cases where one person has signed on behalf of another.

[1] Bills of Exchange Act, 1882, s. 32 (1) "the simple signature of the endorsee . . . is sufficient."

[2] See Sir J. Paget's pungent comments on this, *op. cit.*, p. 208.

[3] *Ibid.*

[4] See Chalmers, *op. cit.*, p. 132, "the usual and proper course is for the holder to sign first the name as described or spelt in the bill, and then to put underneath his proper signature."

A signature by an agent is usually called a "*per pro.*" signature (*per procurationem*) because that form of words is most commonly used to denote the character in which the signer signs; whether the words "*per pro.*" appear before or after the name of the principal, or agent, appears to be immaterial in practice.[1] It has sometimes been said that the words "*per pro.*" indicate "a special and limited" authority quite different from the words "for or on behalf of,"[2] and it is true that in their literal signification they mean that the signer holds a power of attorney from his principal. What are called "*per pro.*" signatures have been so long used in commerce as an indication that the signature is that of an agent that it may be doubted whether the distinction is a real one, and it is submitted that it is immaterial what form of words is used provided they indicate quite clearly that the endorser acts for somebody else, and are not merely words of description.

**ILLUSTRATION**

Payee *John Brown*. *Endorsement W. Robinson for John Brown* is good,[3] but not (it is submitted) *John Brown, W. Robinson* (*agent*), since the word "agent" may simply describe Robinson's business.

It has been held that the words "*per pro.*" are limited to agency on behalf of a natural person and do not extend to a signature on behalf of a company which cannot sign by itself, but this seems questionable.[4]

An endorsement by an agent must (*a*) sufficiently describe the payee as well as (*b*) the agent, and (*c*) indicate the capacity in which the latter acts.

It is a fairly common practice for the drawer, at the

[1] See Paget, *op. cit.*, p. 211, for the contention that they should appear before the name of the agent, though this is contrary to the usual view.

[2] See per Scrutton, L.J., in *McDonald & Co.* v. *Nash & Co.* (1922), 12 Ll. L.R. 464 at pp. 469–70.

[3] See per Scrutton, L.J., in *McDonald & Co.* v. *Nash & Co.* in C. of A. quoted Paget, *loc. cit.*, p. 210.

[4] Per Rowlatt, J., in *Alexander Stewart* v. *Westminster Bank* [1926], W.N. 271. In the Court of Appeal the point was left open.

payee's request, to indicate on the instrument itself an agent who is to receive payment on the payee's behalf: as "Pay AB per the CD Bank," this form being most commonly used to enable a banker to collect dividends for his customer without any need for the customer first to receive the warrant. There has been a controversy as to what is the correct endorsement in such a case, but it is now clear that the agent CD must show that he endorses in a representative capacity, i.e. the form of the endorsement must correspond with the form of the order, in substance if not in detail.

**ILLUSTRATION. SLINGSBY *v.* DISTRICT BANK**[1]

The executors of a will had an account with the defendants. One, Cumberbirch, partner in the firm of Cumberbirch & Potts, acted as their solicitor. They instructed him to draw a cheque on their account payable to a firm of stockbrokers, John Prust & Co. He did so, leaving, however, a considerable gap between the name of the payee and the words "or order." The executors then signed the cheque, and entrusted it to C to send it to Prust. He, however, inserted the words "per Cumberbirch & Potts" in the before-mentioned space so that the cheque read "Pay John Prust & Co. per Cumberbirch & Potts or order." He then endorsed it "Cumberbirch & Potts" and paid it into the account of a company with which he was connected and it was duly collected. In an action by the executors against the paying bank it was held that the protection of Sect. 60 (or of Section 80) had been forfeited because payment had been made on an irregular endorsement.

**Corporation Payees—companies**

If the instrument be made payable to a corporation it is clearly necessary that the endorsement should be written by a properly authorised officer or agent. The Companies Act, 1929, Sect. 30, provides that a bill or note "shall be deemed to have been . . . endorsed on behalf of a company if . . . endorsed in the name of or by or on behalf of or on account of the company by any person acting under its authority." It would seem to follow that a cheque payable to the Dash Dash Coy. Ltd. is properly endorsed as to form if the words

[1] [1931] 2 K.B. 588 and see p. 76, *ante*.

"Dash Dash Coy. Ltd." appear on the back of it, i.e. that the name of the payee company is a sufficient endorsement provided it corresponds with the name used in the body of the instrument, such abbreviations as *Coy.* and *Ltd.* being in order.[1] Such a rule, however, would be an invitation to forgery, and in practice such an endorsement is not accepted either by the banks or by persons becoming holders for value of such instruments. Before a limited corporation's endorsement will be treated as regular, it must contain (*a*) the corporation's designation, preferably exactly in the words used in the body of the instrument, though slight variations from this are permissible, provided there can be no doubt as to identity, e.g. a cheque payable to the Blankville Town Council may be endorsed in the name of the mayor and corporation of Blankville; and (*b*) the signature of the person actually signing; and (*c*) a clear indication of the capacity in which he signs. If, therefore, the cheque be payable to the Dash Dash Coy. Ltd., the endorsement should be in some such form as "for (or per pro.) Dash Dash Coy. Ltd., William Smith, director": an endorsement by the Dash Dash Coy. Ltd. alone or by W. Smith alone or, it is suggested even such an endorsement as—

Dash Dash Coy. Ltd.
W. Smith, director.

should be treated as irregular because there is no clear indication that Smith is signing on behalf of the company, and not in his own capacity. It is believed however that the banks in practice accept such endorsements as that just illustrated.

**Non-trading corporations**

The position of corporations which are not trading companies, e.g. local authorities, would appear to be similar except that more latitude is allowable in the way of variations between the name of the corporation as it appears in the body of the instrument and in the endorsement, providing that the correspondence of

[1] See *Stacey* v. *Wallis* (1912), 28 T.L.R. 209 as to such abbreviations.

identity is clear, e.g. a cheque made payable to the Blankville Town Council may, as we have just seen, be endorsed in the name of the mayor and corporation of Blankville.

A third important type of case where one person will often be found endorsing for others occurs where the instrument is payable to joint payees, as in the case of partnerships (firms). There is, however, an important distinction between a firm and other joint payees. Every partner has *prima facie* authority to bind his firm within the ordinary scope of the business, and it is considered that in modern business conditions this includes the endorsing of cheques.[1] In the case of other joint payees there is no such presumption of agency. Thus a cheque made payable to a firm, e.g. Dash Blank & Coy., may be properly endorsed in the name of the firm as *Dash Blank & Coy.*, or *Dash & Blank* or *P. Dash, K. Blank*, or *p.p. Dash Blank & Coy.* by one or other of the partners, or possibly even by individual partners such as " P. Dash " or " K. Blank," though this must be regarded as doubtful since there is no indication of the authority of the endorser. A cheque made payable to *P. Dash and K. Blank* (joint payees) must be properly endorsed by each of the payees unless the one endorsing has authority to endorse for the others,[2] and as to this the bank should have satisfactory evidence.[3] In such a case the endorsement should make clear that the person endorsing signs for both parties. In the case of dividend warrants there is said to be a custom contrary to this rule.[4]

Firms and joint payees

A question has been raised as to the position of the banker when the endorsement is made in Arabic, or some other form of writing using other than the Latin

[1] It is the writer's opinion that the distinction between trading and non-trading firms which is of importance in connection with acceptance or other dealings in bills and negotiable securities does not apply to the drawing of cheques, nor to their endorsement, in so far as this is required for purposes of obtaining payment.

[2] Bills of Exchange Act, 1882, s. 32 (3).

[3] See Chapter IX.

[4] See Chapter VII, p. 152, *post*. They are paid on the endorsement of any payee.

characters commonly used in Western Europe.[1] Paget, after discussing such authorities as there are—they hardly have a direct bearing on the point—concludes that the banker has the right to make reasonable inquiries before paying the cheque. The real test is perhaps whether such a payment would be made in the ordinary course of business. In the absence of any course of business, it is suggested that the banker in his position of mandatory has the right to have his position made clear.[2]

The other rules as to endorsement laid down in Sect. 32 will, of course, be borne in mind, viz. that the endorsement must be of the entire instrument, though an endorsement *sans recours*, i.e. negativing the liability of the endorser, or restricting the further transfer of the instrument will be good. These rules, however, apply to true endorsements only,[3] and not to the type of acknowledgment-endorsement with which the banker is usually concerned.

## LIABILITY WHERE ENDORSEMENT FORGED

**Forged and unauthorised endorsements**

If the banker pays a cheque or domiciled bill to a person holding under a forged or unauthorised endorsement he has failed to obey his customer's mandate, which was to pay the money to the payee or his order, and has paid somebody entirely different. *Prima facie* therefore he is not in such a case entitled to debit his customer's account with the amount paid away, and is liable to the true owner of the instrument whose property he has converted. Such was the position at Common Law; one highly onerous to bankers, but now substantially modified in the case of cheques by the protective sections of the Bills of Exchange Act, 1882, already referred to.[4]

**Endorsements on domiciled bills**

In the case of an ordinary bill of exchange accepted by a person payable at his bank (i.e. domiciled there), Sect. 60 does not apply, and the position is still governed by the Common Law rules, under which payment must

[1] Paget, *op cit.*, p. 18.
[2] See p. 60, *ante*.
[3] See p. 74, *ante*.
[4] See p. 50, *ante*.

be made "in due course" by or on behalf of the customer.[1] The banker must, therefore, pay even greater attention to endorsements upon his customer's acceptances which are presented to him for payment than he does in the case of cheques.

**ILLUSTRATION. ROBARTS *v.* TUCKER[2]**

Robarts were bankers, and Tucker was the representative of an insurance company which banked with them. The company had to pay a claim, and in order to do so authorised their local agent to draw a bill upon them for £5000 payable to the order of the persons claiming the money and domiciled with Robarts, the plaintiffs. The agent drew the bill which was handed to the legal representative of the payees who forged their signatures, and negotiated the instrument for value. The endorsees then presented it to the insurance company for acceptance; it was duly accepted, presented to Robarts for payment, and paid. Robarts then debited the account of the company with the amount, but on the forgery coming to light the latter claimed that they were not entitled to do so.

*Held:* That the company's account could not be debited. The endorsees had no title to the instrument owing to the forgery, and the bankers had accordingly paid without their customer's authority.

Parke, B. "If bankers wish to avoid the responsibility of deciding upon the genuineness of endorsements, they may require their customers to domicile their bills at their own offices."

Maule, J. "In such a case I conceive that the banker would be justified in refusing to pay till he had more information as to whether the presenter was holder or not."[3]

## PROTECTION OF PAYING BANKERS

The protection in connection with cheques above referred to was first conferred in somewhat earlier statutes,[4] synchronising with the rapid development of deposit banking which occurred in the middle of the nineteenth century, and resulted in a much increased use of the cheque system. It is obvious that the avail-

[1] See s. 59. [2] (1851), 16 Q.B. 560.

[3] But see per Lord Macnaghten in *Bank of England* v. *Vagliano*, [1891] A.C. 107.

[4] See the Stamp Act, 1853, 16 & 17 Vict., c. 59, and the Crossed Cheques Acts, e.g. 19 & 20 Vict., c. 25, and 39 & 40 Vict., c. 81.

able routine in a bank and at the Clearing House gives no opportunity for the investigation of endorsements, except as to their outward regularity. If inquiries were to be made, much expenditure of time and money would be involved, and the instrument could only nominally be payable on demand; indeed the system which we know would be impossible. The real question is whether the risk of forgery is to be borne by customer or banker. Originally the banker took it, and there has always been a school of thought which has held that it is fair that he should do so. Parliament, however, decided otherwise, though it is interesting to note that in Canada, and some parts of the U.S.A., the Common Law rules still have force.

Sect. 60 of the statute which in substance reproduces Sect. 19 of the Stamp Act, 1853, provides that when a banker on whom a cheque is drawn pays it "in good faith, and in the ordinary course of business, it is not encumbent on the banker to show that the endorsement of the payee, or any subsequent endorsement was made by or under the authority of the person whose endorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such endorsement has been forged or made without authority." The wording of the section is not entirely happy, but the meaning is presumably that if a banker pays a cheque on the basis that a particular endorsement is valid, but which turns out to be bad, he is to be put in the same position as if it had in fact been valid, provided he has acted in good faith and in the ordinary course of business.[1]

Sect. 19 of the Stamp Act, 1853, was not repealed,[2] and it covers a wider class of instruments than cheques, viz. "any draft or order drawn upon a banker for a sum of money payable to order on demand," and therefore protects payment of, e.g. dividend and interest warrants, drafts drawn on the head office by a

[1] As to the meaning to be attached to the word "endorsement" in this section, see p 104, *post*

[2] But see the contrary opinion of Slesser, L.J., referred to in note 1, p. 89, *post*.

branch bank, i.e. banker's drafts,[1] documents issued by the Paymaster-General in pursuance of the Chancery Funds Act,[2] etc. It has been stated that the section does not apply to foreign drafts on the ground that the Stamp Act is only concerned with inland bills, but the words are unqualified.[3] The section is one which may from time to time be of practical importance to banks, and should always be considered in addition to Sect. 60 of the main statute.

Customer's signature forged

It will be observed that the section applies in terms to all endorsements. It is, of course, quite possible that the customer's own signature may be forged whether to a cheque drawn to his own order, or to a cheque of which he is payee drawn by some other customer of the same banker. It has been questioned whether a banker paying upon such an endorsement is protected by these sections on the ground that it is his duty "to recognise his customer's signature." There appears to be no authority laying down any such duty,[4] and there seems no good reason for any such exception.

Conditions of protection

A banker can only claim the protection of Sect. 60 if he can prove that he acted, (*a*) in good faith, and (*b*) in the ordinary course of business. The Stamp Act, 1853, Sect. 19, does not, however, contain any such conditions, but the effect of this difference does not appear to have been considered by the Courts. A banker, however, would appear to be under the duty to act in good faith towards his customer by virtue of their legal relationship,[5] and it is considered that if there were any lack of *bona fides* he would invoke Sect. 19 in vain. It may also be that a banker is under a duty not to be negligent in cashing his customer's mandates whatever their form.[6] If this be so, any

[1] See p. 152, *post*, and *Capital and Counties Bank* v. *Gordon*, [1903] A.C. 240.

[2] 35 & 36 Vict., c. 44, s. 11.

[3] See Chalmers, *Bills of Exchange Act*, 9th Ed., p. 247. This point is mentioned by Lord Lindley in *Capital and Counties Bank* v. *Gordon*, *ubi supra*, at p. 251, but he refrains from deciding it.

[4] See p. 94, *post*, for discussion of this maxim.

[5] Cf. the duty of confidence and *Tournier* v. *National Provincial Bank*, [1924] 1 K.B. 461, above Chapter III, p. 17.

[6] See e.g. *Slingsby* v. *District Bank*, [1932] 1 K.B. 544.

departure from the ordinary course of business would usually be considered negligence, but whether the section only applies for the benefit of the banker when he is observing his duties towards his customer may prove a very difficult question.[1]

Good faith

The meaning of the expression "good faith" should be familiar to all students of the law of bills of exchange, because it is an essential element in the position of a holder in due course. It is only necessary to recall that by Sect. 90 of the statute "a thing is deemed to be done in good faith within the meaning of the Act when it is in fact done honestly, whether it is done negligently or not."

**ILLUSTRATION. RAPHAEL v. BANK OF ENGLAND[2]**

The plaintiff was a money changer in Paris. He received a circular from the defendant containing a list of stolen Bank of England notes with their serial numbers. Afterwards he changed a stolen note which appeared upon this circular, but he negligently failed to refer to the circular before doing so. The jury found that there had been no dishonesty on his part, simply inadvertence.

*Held:* That he was entitled to recover as a *bona fide* holder of the note in question.

There appears to be no reported case where an allegation of bad faith has been made against a bank in connection with this section, and such charges are likely to be rare.

Ordinary course of business

The question whether the banker has acted in the ordinary course of business seems at first sight much more likely to arise, though here again decisions even indirectly in point have been few. It has already been suggested[3] that payment on an irregular endorsement

[1] In *Carpenters' Company of the City of London* v. *British Mutual Banking Co., Ltd.*, (1937), 53 T.L.R. 276, the defendants both paid and collected the cheques Their negligence took place in relation to collection, but the judge appears to have considered that negligence does not forfeit protection under s. 60 or under s. 19. This was reversed on appeal, see 43 Com. Cas. 38, where Slesser, L.J., expressed the view that s. 19 of the Stamp Act has been repealed by s. 60 of of the Bills of Exchange Act, 1882, so far as bills and notes are concerned.

[2] (1855), 17 C.B. 161.

[3] See p. 78, *ante*.

would not be in the ordinary course of business, and it is equally clear that any payment in contravention of a crossing, or of the prohibition of double crossings contained in Sect. 79 (1) of the statute would equally forfeit the protection of the section.

**ILLUSTRATION**

Jones draws a cheque on the Dash Bank payable to *Smith or Order*, crosses it, and sends it to the payee from whom it is stolen. The thief forges Smith's endorsement, and presents it to the bank for payment. It is paid. The bank cannot debit Jones' account with the amount.[1]

Another possible case of infraction of this condition which has been suggested is when a cheque for a very large sum is presented for payment over the counter. In modern practice, cheques are normally presented at the Clearing House by collecting banks, and this would particularly be so if the amount was very large. Although unusual, however, it cannot be said that there is any practice against the payment of large cheques over the counter, and *prima facie* there is the duty to pay on demand. In *Bank of England* v. *Vagliano*[2] Lord Macnaghten said, "bankers who undertake the duty of paying their customer's acceptances cannot do otherwise than pay offhand, and, as a matter of course, bills presented for payment which are duly accepted, and regular and complete upon the face of them." The only other case[3] where this point has been raised was also on a bill of exchange, but there is no difference in principle, or if there is it is in favour of paying the cheque. In the latter case, however, Wright, J., thought that the position might be different if the holder were very obviously a person unlikely to be handling a large sum of money, such as an office boy, or a tramp.

It has been suggested that a payment made after business hours is not in the ordinary course of business. There is no authority on this point. It has been said

[1] See *Smith* v. *Union Bank* (1875), 1 Q.B.D. 31, at p. 35, *per* Lord Cairns.

[2] [1891] A.C. 107.

[3] *Auchteroni* v. *Midland Bank*, [1928] 2 K.B. 294.

that the bank prescribes its hours of business for its own convenience,[1] and within limits this would appear to justify such action. But if, for illustration, the payee were to knock up a bank manager in the middle of the night and ask him to pay the cheque, payment could hardly be regarded as in the ordinary course of business.

What is the ordinary course of business is a question of evidence depending on the actual practice of the bank in question, and not, it is submitted, on there being a general practice among bankers. It is stated, for example, by Paget[2] that it is "not the custom of bankers to comply with a letter from an unknown private person enclosing a cheque ostensibly endorsed, and asking for the amount to be remitted in notes by post. Were the notes sent, the payment presumably would not be in the ordinary course of business," from which it would appear that it is the view of that eminent authority that the words of the section refer to some general course of banking business, but there is nothing in the section calling for such an interpretation, and banking practices often differ from one bank to another.

Due Care

It is noteworthy that Sect. 60 does not make the exercise of due care a condition of the banker's protection, and in this it differs from Sect. 80 which is discussed later.[3] It has already been suggested that there may well be a duty on the banker to exercise care in dealing with his customer's mandates, but whether the terms of Sect. 60 excuse the banker from duties other than those of good faith and action in the ordinary course of business seems doubtful. Probably they do,[4] but since for most purposes due care and action in the ordinary course of business will be synonymous, it may be a long time before the question is decided.

[1] *Baines* v. *National Provincial Bank* (1927), 32 Com. Cas. 216, where a cheque was cashed out of hours.

[2] *Op. cit.*, p. 207.

[3] See p. 101, *post*.

[4] It should be noted that under s. 19 of the Stamp Act, 1853, it was held that negligence did not forfeit the protection of the section: *Bissell* v. *Fox* (1885), 53 L.T. 193. See also *Carpenters' Co.* v. *British Mutual Banking Co.* (1937), 53 T.L.R. 276.

Discharge of cheque

It will be observed that the later part of Sect. 60 enacts that a cheque so paid is deemed to have been paid in due course, and the effect of this is to discharge the instrument.[1] Sect. 19 of the Stamp Act, 1853, does not contain any such provision, but the same result appears to follow by implication from the earlier part of the section.[2]

Material alterations

A further possibility which may give rise to difficulties is that the cheque may come to the paying banker in a different form from that in which it left the drawer. Alterations in the amount of the sum payable have already been discussed. The effect of other material alterations would appear to be similar. A material alteration will avoid the instrument,[3] and a banker paying a void instrument cannot debit his customer with the amount.[4] It has already been suggested[5] that there is a possible distinction between a cheque as mandate and as a negotiable instrument; since, however, a material alteration in the mandate would usually have the effect of leading the bank not to carry out their customer's intentions, this distinction, even if valid, would seldom operate to save the banker. Certain material alterations are given in Sect. 64 (2), viz. alteration in date, in sum payable, and in time for payment—an alteration here would, of course, alter the whole character of a cheque. Other equally material alterations are not referred to in the section, such as that of an order to a bearer cheque, though the converse, i.e. the alteration of a bearer to an order cheque, has been held not to be material.[6] A crossing "authorised" by the Bills of Exchange Act is a material part of a cheque.[7] It is unlawful for any person to obliterate, or, except as authorised by the Act, to add to or alter a crossing.[8] "Not negotiable" being author-

[1] See Bills of Exchange Act, 1882, s. 59 (1).
[2] Cf. *Halifax Union* v. *Wheelwright* (1875), L.R. 10 Ex. 183.
[3] S. 64 (1).
[4] See *Slingsby* v. *District Bank*, [1931] 2 K.B. 588.
[5] See p. 52, *ante*.
[6] Cf. *Attwood* v. *Griffin* (1826), 2 C. & P. 368.
[7] See Bills of Exchange Act, 1882, s. 78.
[8] *Ibid.*

ised as part of the crossing by statute (Sect. 76 (iii) (*b*)) comes under Sect. 78. It is suggested that "account payee" must be regarded as a material part of the cheque, though not addressed to the paying bank and not authorised by the Act. It will be remembered that it is permissible to add a crossing or to add to an existing crossing within the limits laid down by Sect. 77. A measure of protection is given to bankers in connection with crossings which have been tampered with and will be discussed later.[1] The practice of striking out a crossing and writing "pay cash" is not uncommon, and may be done by the drawer at the request of the payee, or by the drawer at the request of his banker when cashing a cheque made payable to self.[2] Such alterations being made with the assent of the parties do not affect the validity of the instrument, though they must naturally be authenticated by the signature of the drawer.

**Altered crossings**

**Alterations facilitated by customer**

It may be that the customer has himself facilitated the making of the alteration. If so the question will arise of how far the principle in *London Joint Stock Bank* v. *McMillan*[3] is applicable. A possible case, though it does not appear to have been before the Courts, would be that of a cheque drawn in lead pencil as already suggested. It is usually said that a banker should refuse to pay cheques made out in such a medium; some bankers provide against it in the conditions on which they accept the customer's account. It might be expected, in view of the enormous growth of the cheque system, that questions of negligence by customers in drawing cheques would be frequent, but there appears to have been only one attempt to apply the *McMillan Case*, viz. *Slingsby* v. *District Bank*,[4] and here again it was the filling in of a gap, viz. that between the name of the payee, and the words "or order" which constituted the fraud.[5] It was there held that to

[1] See pp. 100, *et seq.*, *post*.
[2] It is difficult to see that the latter procedure, though insisted on by most banks, has any real value.
[3] Above, p. 75, *ante*.
[4] [1931] 2 K.B. 588.
[5] See the facts of this case dealt with at p. 82.

leave a space in this part of the cheque was not a breach of duty by the customer. In order to prevent frauds of this kind, however, the value of drawing heavy lines in such gaps should be brought to the attention of all persons making use of the cheque system.

## FORGED AND UNAUTHORISED SIGNATURES

**Forgery of customer's signature**

There remains the possibility that the cheque presented for payment is not the customer's instrument at all but a forgery, or that his signature has been forged, or signed without his authorisation. A banker paying a cheque falling within these categories is not entitled, *prima facie*, to debit the customer's account. A forged drawing is inoperative,[1] as indeed is an unauthorised drawing, and the position is the same as if no mandate had ever been issued: it is accordingly quite immaterial that the forgery was so skilful that it could not reasonably have been detected. The maxim that "the banker must recognise his customer's signature" expresses this principle, but inaccurately, since it is not a question of having failed in a duty, but of having paid without instructions. This fundamental rule is not in any way cut down by the Bills of Exchange Act, and it is an inattentive student who reads Sect. 60 as applicable to such cases.

**Estoppel**

The exceptions to this rule result from estoppel or ratification. A customer may be estopped from asserting that his signature has been forged or attached without authority, in other words he may not be allowed to contend that what purports to be his signature is not in fact genuine. Such an estoppel may result from express representation by the customer that the signature on the instrument is indeed his own, as might happen if the cashier being in doubt referred the cheque to him, and was informed that it was in order.

### ILLUSTRATION. LEACH *v.* BUCHANAN[2]

The acceptance to a bill of exchange was forged. A person who was negotiating with a view to becoming holder

[1] See Bills of Exchange Act, 1882, s. 24.
[2] (1803), 4 Esp. 226.

being doubtful about the drawee's handwriting sent to ask him if the acceptance was his and received an affirmative reply. The drawee afterwards refused to pay and pleaded the forgery.

*Held:* He was estopped from denying that the acceptance was his.

Again estoppel may arise through the breach by a customer of his duty to his banker to inform him that he has discovered that his signature is being forged to cheques. If the customer fails in this duty he represents in effect that later signatures, though in fact forged, are genuine, and he will be estopped from contending against his banker that payment should not have been made on such signatures.

**ILLUSTRATION. GREENWOOD *v.* MARTINS BANK**[1]

The plaintiff's wife had operated upon his account with the defendant bank by forging a series of cheques in his name. The plaintiff had discovered these frauds, but at his wife's earnest solicitation had foreborne to inform the defendants of his discovery. Later she resumed her criminal activity and on further discovery the plaintiff was not again to be persuaded. The wife committed suicide and the husband afterwards informed the defendants. The plaintiff sued the defendants to recover the money paid away.

*Held:* That it was the plaintiff's duty to inform the defendants of the forgery as soon as he knew of it. Having failed to do so he was estopped from complaining of their subsequent payment of cheques.

Similarly an estoppel might arise in the case of an unauthorised signature appended, e.g. by an agent, from the fact that the customer had not in the past taken objection to payment having been made on such signature.

An unauthorised signature might, of course, be ratified, but it would then become legally equivalent to a genuine signature, and the right to debit the account depends simply on proof of ratification. An **Ratification** unauthorised signature like a forged signature is in itself a nullity, but the proviso to Sect. 24 of the statute

[1] [1933] A.C. 51.

permits ratification of such signatures "not amounting to forgery." This appears to indicate that a forged signature cannot be ratified, but the matter cannot be regarded as beyond dispute, since it has never been decided that an act which is void in law cannot be ratified. Chalmers[1] was of opinion that a forged signature on a bill could not be ratified though the case on which he principally relied[2] was really a case of an agreement to stifle a prosecution, and not a simple ratification. Against this view can be put a strong dictum of Lord Blackburn in *McKenzie* v. *British Linen Company*.[3]

Acts which can be relied upon as acts of ratification will commonly furnish material for estoppel, but since an estoppel is usually only effective as between the actual parties to it while a ratification, if valid, enures for the benefit of all who become parties to the instrument, the distinction between the two may be important. It is, however, not one which is likely to concern bankers in connection with the payment of customer's cheques.

*Per pro.* signatures

Disputes as to whether the customer's signature was or was not authorised frequently arise in cases where he has granted a power of attorney. A signature appended by the attorney which falls outside the limits of the power is just as inoperative as any other unauthorised signature, and the real question will be that of construing the instrument in order to ascertain what powers were actually granted. A signature by one holding a power of attorney, or indeed by any other agent will usually indicate the character in which the drawer signs, as "John Smith by his attorney William Robinson," or "p.p. John Smith, William Robinson". Such a signature "operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature, if the agent in so signing

[1] See his *Bills of Exchange Act*, 1882, 9th Ed., p. 87.
[2] *Brook* v. *Hook* (1871), L.R. 6 Ex. 89.
[3] (1881), 6 App. Cas. at p. 99; Cf. also per Lord Tomlin in *Greenwood* v. *Martins Bank*, [1933] A.C. 51 at p. 57, and see *Bank of England* v. *Trustees of Evans Charities* (1855), 5 H.L.C. 389.

was acting within the actual limits of his authority."[1] It is very important, therefore, from the banker's point of view, to examine the power of attorney, or other authorisation,[2] carefully in order to ascertain that the power to draw cheques has been granted, and if so whether it is subject to any limitations. If the signature is in order within the authorisation, the banker can safely pay, and will not be affected by the fact that the agent actually uses the cheques for wrongful purposes.[3]

**Facilitation of forgery of drawer's signature**

More difficult is the position which arises when the customer's signature is forged in circumstances which might have been prevented had more care been taken over supervision, or a less blind confidence been placed in subordinates of dubious record, and character. Again, if contrary to the directions printed upon most cheque books, the customer leaves his cheque book lying about so that it is stolen, and his signature forged to some of the cheques, the bank would at any rate have a moral claim that the customer should bear the loss. There appears to be no estoppel in such cases. It is not clear whether there is any, and if so what duty, on the customer's part towards the banker in this connection. The duty defined in the *McMillan Case*[4] does not extend so far as to cover these cases, and if there be a duty of care on the customer in these sorts of circumstances it is one not easily formulated. Even if there is such a duty, it is strongly arguable that a loss resulting from forgery is not directly caused by any breach of duty, but by the wrongful act of a third party. Such decisions as there have been are against the existence of such a duty, but they were given before the *McMillan Case* had placed a higher obligation upon

[1] Bills of Exchange Act, 1882, s. 25; see also above, p. 80, in connection with endorsements.

[2] When a customer wishes to give power to a third party to operate his account, it is usual for him to do so by means of a mandate to the bank.

[3] Cf. *Morison* v. *London County and Westminster Bank*, [1914] 3 K.B. 356, where no complaint could be made against the paying bank.

[4] [1918] A.C. 777.

the customer than had previously been generally thought to exist, and in that case Lord Finlay said expressly "forgery is the very thing against which the customer is bound to take reasonable precautions."

### ILLUSTRATION 1. LEWES SANITARY LAUNDRY COY. *v.* BARCLAY BEVAN AND COY.[1]

The secretary of the plaintiff company had some years before the incidents in this case been guilty of forgery. The chairman of the directors knew of this, but of nothing against him in more recent times. The company's cheques had to be signed by the secretary and one director. The secretary kept the company's cheque book and pass book. He made use of this fact to use the cheque book, forged the signature of a director to a number of cheques, appended his own, and obtained payment. The plaintiffs sued to recover the money paid away. The defendants alleged negligence against the plaintiffs on the basis of the chairman's knowledge.

*Held:* That the defence failed. It was not enough for the banker to show that customer's conduct had enabled fraud to be committed, they must show that loss directly resulted from such conduct.

Per Kennedy, J., there is "a duty to be careful not to facilitate any fraud which when it has been perpetrated, is seen to have in fact flowed in natural and uninterrupted sequence from the negligent act." This statement was approved by Lord Haldane in the *McMillan Case*.

### ILLUSTRATION 2. KEPITIGALLA RUBBER ESTATES, LTD. *v.* NATIONAL BANK OF INDIA[2]

The plaintiff company had an account with the defendants, and gave instructions that cheques would be signed by two directors and the secretary. The secretary forged the signatures of two directors to cheques made payable to the order of various payees, added his own signature, and then altered the word order to bearer by means of which he got the cheques cashed. The plaintiffs claimed to recover the amounts so paid away, and the defendants contended *inter alia* that on the facts the plaintiff had been negligent.

*Held:* The plaintiffs were under no duty so to organise their business that forgeries of cheques could not take place.

[1] (1906), 11 Com. Cas. 255.
[2] [1909] 2 K.B. 1010.

The forms of crossing which may appear upon a cheque have already been discussed.[1] A crossing upon a cheque has now become the equivalent of a direction to the paying bank to carry out the customer's mandate in a particular way, viz. by making the repayment through another bank (the case of the general crossing) or through a particular bank (special crossing). The Crossed Cheques Act, 1876,[2] Sect. 7 made it obligatory upon a banker to obey crossings. The Bills of Exchange Act, 1882, repealed this provision, but itself enacts a definite prohibition in one case only, viz. where "a cheque is crossed specially to more than one banker, except where crossed to an agent for collection being a banker."[3] There is no special penalty established for the breach of this rule, but in all cases where a banker disregards a crossing, that is by failing to make payment to a banker or to a named banker, he will be liable to the true owner of the cheque for any loss which he may sustain owing to the cheque having been so paid,[4] and is also guilty of a breach of duty to his customer which will, it is submitted, disentitle him to debit the account with the amount paid. For these purposes payment is not confined to legal tender, but is complete if the banker gives his own cheque, provided, of course, this is accepted by the holder.[5]

Crossed cheques

The expression "true owner" used here, and in later sections of the statute, is not defined but it appears to mean the person who would have been entitled to sue upon the instrument as holder in due course had it not been avoided by the material alteration, or if it has not been so avoided the person who is entitled to the possession of it. A person who has taken an instrument by virtue of a forged endorsement cannot be a true owner, while a person who has taken an instrument crossed "not negotiable" may or may not be a true owner according to the circumstances. Apart from Sect. 79 the banker would not be liable to the true

Meaning of "true owner"

[1] Pp. 55, *et seq.*, *ante*.
[2] 39 & 40 Vict., c. 81.
[3] S. 79 (1).
[4] S. 79 (2).
[5] Cf. *Meyer & Co.* v. *Sze Hai Tong Banking Co.*, [1913] A.C. 847.

owner as a result of disregarding a crossing, since there is no contractual relationship, and failure to observe a crossing would not appear to result in conversion, as was held before the passing of the 1882 Act.

**ILLUSTRATION. SMITH *v.* UNION BANK OF LONDON**[1]

A gave to the plaintiff as payee a cheque for £21 9s. drawn upon the defendant bank. The plaintiff then crossed it specially to the London and County Bank, and endorsed it in blank. It was then stolen and afterwards came into the hands of C, who paid it into his bank, the London and Westminster, for collection. The last-named bank presented it to the defendants who paid it notwithstanding the crossing. The plaintiff sued them in conversion.

*Held:* That the prohibition in the statute did not affect the negotiability of the cheque which was in a negotiable state, and there was therefore no conversion.

It has already been pointed out[2] that a crossing is a material part of a cheque, and that an unauthorised alteration in it therefore appears to avoid the instrument. There is obviously a risk of crossings being tampered with from time to time, and the legislature has accordingly conferred a valuable protection upon

Tampering with crossings

the banks by providing that "where a cheque is presented for payment which does not at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated or to have been added to or altered otherwise than as authorised by this Act the banker paying the cheque in good faith and without negligence shall not be responsible or incur any liability, nor shall the payment be questioned by reason of the cheque having been crossed or of the crossing having been obliterated or having been added to or altered otherwise than as authorised by this Act, and of payment having been made otherwise than to a banker or to the banker to whom the cheque is or was crossed, or to his agent for collection being a banker as the case may be."[3] It will be seen that the protection is limited to payments made in conformity with the crossing as it ostensibly appears on the face

[1] (1875), 1 Q.B.D. 31.
[2] P. 92, *ante*.
[3] Bills of Exchange Act, 1882, s. 79 (2).

of the cheque on ordinary careful examination; if the crossing had obviously been altered, there would be no protection. Three different kinds of dealings with the crossings are covered—all that appear to be possible, viz. obliteration which would make the cheque appear open; unauthorized addition which is unlikely to happen in practice, as a thief or similar person will not wish to add to the difficulties of negotiation or collection; and alteration.

Protection to banker under Sect. 80

The familiar Sect. 80 of the statute, which is in effect reciprocal to Sect. 79 (2), gives protection to the banker who pays a crossed cheque in good faith and without negligence in accordance with its crossing. Under this section, the banker is placed in the same position as if he had paid the cheque to the true owner, so that neither the latter nor the drawer can complain, the one of the payment, or the other of the debiting of his account. Incidentally, if the cheque has come into the hands of the payee, the customer is protected by the section, for he is entitled to rely upon the payment made by his banker as if it had been made to the true owner of the instrument. Indeed the section is of greater value to the customer than to the banker, because the latter is already protected by Sect. 60 against the effects of forged endorsements which are the greatest danger to which he is subjected. It must, of course, be observed that the protection given by Sect. 80 is general in its terms, and not confined like Sect. 60 to cases of forged endorsement. It is not, however, very obvious what are the other types of risk against which the section can protect the banker, unless it be argued that he is protected against the risk of material alterations. This can hardly be so, because such alterations[1] avoid the instrument altogether. Moreover, in the case of altered crossings, express protection is given by Sect. 79 (2) which would be unnecessary if Sect. 80 gave general protection.

It often happens that the drawer of a crossed cheque wishes to "open" the crossing, e.g. when he wishes to

[1] See discussion, pp. 92, *et seq.*, *ante*.

obtain cash over the counter. This might lead to difficulty if the cheque was in the hands of a third party. The Committee of the London Clearing Banks have, therefore, ruled that such a cheque shall only be paid if the "opening" is accompanied by the full signature of the drawer and payment is made either to him or his known agent; for the bank might be liable to the true owner in conversion if payment were made to the wrong person.[1]

It has been observed that while Sect. 60 requires payment "in the ordinary course of business," Sect. 80 requires due care. Exceptionally it might be possible to contend that a payment not made "in the ordinary course of business was made with due care (for it may occasionally be reasonable conduct to depart from the ordinary practice). But in the normal case, Sect. 80 would not appear to give any wider protection than Sect. 60, and the absence of decisions on the section supports this view.

The payment must have been made in accordance with the crossing, i.e. "if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection, being a banker."

"Not negotiable"

As we have already seen,[2] the words "not negotiable" may be part of the crossing, but their presence on the cheque does not seem to add to the responsibility of the paying banker, and he is under no obligation if such a cheque is presented for payment on behalf of a holder, other than the payee, to inquire into his title. It is submitted that the position would be the same if the cheque were marked "not negotiable" without any crossing. Paget contends that payment might be refused in such a case on the ground that when the words do not form part of a crossing they are irregular or that payment might equally be made on the ground that the words are of no effect.[3]

[1] *Paget, op. cit.*, 226. [2] See pp. 53, *et seq.*, *ante*.

[3] See for further discussion of this matter, p. 54, *ante*. In *Carlon* v. *Ireland* (1856), 5 E. & B. 765, it was considered that a cheque with the banker's name written across it but without parallel lines was effectively crossed.

The position is the same when the instrument is crossed "account payee." Although at first sight such a crossing would appear to be a direction given by the drawer to the paying bank, since it is only between these two that a contractual relationship exists, the decisions show that it is addressed to the collecting bank,[1] and would therefore not appear to be any concern of the paying bank. Indeed it would manifestly be impossible for a paying bank to satisfy itself that the money paid should actually reach the account of the payee, except in the accidental circumstances of its also being the collecting bank; at the most it could only obtain an assurance from the collecting bank as to the action proposed on its part. It does not even appear to have been argued that the obligation goes so far as this.

**"Account payee"**

## ENDORSEMENT AS RECEIPT

**Endorsement as receipt**

On paying a cheque, a banker is, in cases where the sum paid amounts to two pounds or upwards, entitled to demand a receipt over a twopenny stamp. Whether he is entitled to a receipt in other cases is perhaps doubtful in law if not in common sense.[2] In practice, however, most cheques are paid through the Clearing House, and whether this is so or not the banker contents himself with an endorsement upon the cheque which is a good receipt. As has already been pointed out,[3] this is not a true endorsement. Several matters which require discussion arise in connection with such signatures.

**Can banker insist on endorsement?**

In the first place, is the banker entitled to insist upon it? There seems no adequate legal reason why such an endorsement should be required.[4] As a receipt it should *prima facie* be required upon a separate document. It is, however, a great convenience to have the receipt informally upon the cheque, and the practice

[1] See p. 132, *post*, and *Morison* v. *London County and Westminster Bank*, [1914] 3 K.B. 356 at p. 374.
[2] See the argument in Paget, *op. cit.*, p. 115.
[3] *Ante*, p. 78.
[4] See *per* Lord Haldane in *McDonald & Co.* v. *Nash & Co*, [1924] A.C. 625 at p. 633.

of obtaining it appears to be universally acted upon, and may therefore have become a binding custom to which the Courts will give sanction.[1] Unless such a custom exists and is upheld, however, there appears to be no way of justifying the practice. When the cheque is drawn payable to the drawer's order the requirement of an endorsement seems particularly unnecessary, and even if a custom were proved it might well be held to be in law unreasonable.

**Argument on Sect. 60 of Bills of Exchange Act.** It has been suggested that in the case of a third party payee, the banker is entitled to have this endorsement in order to bring himself within Sect. 60 of the Act.[2] This argument is based on a fallacy, possibly on two fallacies. In the first place, it assumes that such a signature on the back of the instrument is in fact an endorsement within the meaning of Sect. 60. This, however, involves placing a different interpretation on the word than that which it is elsewhere given in the Act.[3] When an order cheque is presented for payment with what appears to be the payee's endorsement upon it, the banker is entitled to treat it as payable to bearer, and if it turn out that the endorsement is forged, Sect. 60 protects him. If, however, it be presented unendorsed by the payee, and the banker insists on one being given, the instrument does not by virtue of such an endorsement become payable to bearer. It remains payable to the payee, and if the person who receives payment is not the payee, the banker is liable to the owner of the instrument for conversion, and cannot debit his customer's account. There is, however, no express decision of our Courts on this point which should perhaps be regarded as open.[4]

Assuming, however, that Sect 60 does assist the banker in such a case, it carries the argument no further than that to ask the payee for his endorsement is good

[1] But see Paget, *op. cit.*, p. 116, where he argues forcibly that no such right exists.
[2] See *ante*, pp. 88, *et seq*
[3] See above and ss. 2 and 8 (3).
[4] See, however, the able argument of Paget, *op. cit.*, p. 116, to the effect above contended for, which is supported by the colonial decisions which he quotes.

policy, for there is nothing in Sect. 60 or elsewhere in the Act conferring the right upon the banker to insist upon it.

## STOPPING THE CHEQUE

Countermand of payment

Even if the cheque presented for payment is in all respects in order, the banker must not, of course, pay it if the customer has countermanded his mandate or, as it is usually expressed, has "stopped" the cheque.[1] If the banker pays after an effective countermand, he cannot debit his customer's account with the amount.

**ILLUSTRATION. READE v. ROYAL BANK OF IRELAND**[2]

The plaintiff had two accounts at the defendant bank. He drew a cheque upon one account, which he afterwards desired to countermand and telegraphed "Stop my cheque 50635 drawn for McEntyre. Reade." The responsible clerk made a note of this against one account only, and the cheque when presented was paid, and debited against the other.

*Held:* The countermand was effective, and the defendants were not entitled to debit the plaintiff.

A countermand is not effective until it actually comes to the knowledge of the banker, or his servants.

**ILLUSTRATION. CURTICE v. LONDON CITY AND MIDLAND BANK**[3]

The plaintiff on the 31st October, 1906, drew a cheque for £63 on the defendant bank. This was in payment for a purchase of horses. When the horses were not delivered, he on the same day, but after business hours, telegraphed a countermand. The same evening a telegraph messenger boy placed the telegram in the letter box at the bank. The telegram was not removed from the box until the 2nd November, owing to an oversight on the part of the person who cleared it. Meanwhile on the 1st November the cheque had been presented and cashed. The plaintiff claimed that the bank was not entitled to debit his account.

*Held:* At the time of presentation and payment, the cheque had not been countermanded, so that the action failed.

[1] Bills of Exchange Act, 1882, s. 75 (1).
[2] [1922] 2 I.R. 22.
[3] [1908] 1 K.B. 293.

It would appear, however, that a banker is under the duty to give prompt attention to his customer's communications, and any failure to do so which resulted in loss to the customer might expose him to an action for damages. As Lord Cozens-Hardy, M.R., said in the case just cited, "it may well be that it was due to the negligence of the bank that they did not receive notice of the customer's desire to stop the cheque. For such negligence the bank might be liable, but the measure of damages would be by no means the same as in an action for money had and received."

The means by which the countermand should be effected was discussed in *Curtice* v. *London City & Midland Bank*,[1] when it was argued that a telegram was not a proper method. It is obvious that there would be considerable danger in acting upon a telegram or a telephone message without confirmation, and the bank would appear to be under no obligation to do so.[2] It would be useful if the banks advised their customers to this effect. The normal business practice would be to confirm a telegram or telephone message by letter.

**Ambiguous countermand**

It is naturally important that the customer should indicate clearly and unambiguously the particular cheque which is not to be paid. The most obvious method of doing this is by reference to the serial number on the cheque. Sometimes, however, the customer simply mentions the name of the payee or the amount of the cheque, possibly adding the date of drawing. If in the result there is ambiguity, and the banker reasonably and honestly reads his instructions contrary to his customer's intention, he will not be liable for any loss which may result on the principle which has already been discussed.[3]

**ILLUSTRATION. WESTMINSTER BANK *v.* HILTON**[4]

The plaintiff, Hilton, who was a bookmaker, drew a cheque on the Westminster Bank on the 31st July, 1924

[1] *Supra.*
[2] See *loc. cit.* Payment might well be postponed.
[3] *Supra*, p. 74.
[4] (1926), 43 T.L.R. 124.

(No. 117285) and post-dated it 2nd August. On the 1st August he telegraphed to the bank "Stop payment of cheque 117283 amount of £8 1s. 6d. to Poate." These particulars were correct as to No. 117285. No. 117285 was presented on 6th August and paid by the bank in the belief that it had been drawn in place of 117283 which it was assumed had been cancelled. Later a cheque for £7 drawn by the plaintiff was dishonoured, the earlier payment of £8 1s. 6d. having practically exhausted the balance of account. The plaintiff thereupon sued the bank for negligence, and in the Court of Appeal succeeded.

*Held:* By the House of Lords that the appellants had placed a reasonable construction on an ambiguous document and were not liable.

Naturally if the banker appreciates that there is an ambiguity, he should seek further instructions from his customer; and similarly if he suspects the authenticity of the countermand. A bogus message sent, e.g. by telegram, would not be effective to countermand a cheque, and the banker who acted upon it, even if he did so reasonably, would be liable to his customer for wrongful dishonour. In circumstances of doubt the banker is entitled to delay carrying out his instructions until he obtains confirmation, taking care meanwhile not to damage his customer's credit by the answer he gives to the payee.

The countermand must be sent to the branch of the bank where the account is kept or it will be ineffective.[1] But if a countermand addressed to the wrong branch were to indicate the branch at which the account was actually kept it is considered that it would be the banker's duty to take the necessary steps to make it effective, but whether in the absence of such indication the countermand would be good may be doubted.[2]

**Garnishee order**

A garnishee order *nisi*[3] may be regarded as a countermand by the Court. Its effect is to revoke the binding character of any mandate which has not been fully acted upon at the time when it is served, or of any

[1] See pp. 69, *et seq.*, *ante*, and *London Provincial and South-Western Bank* v. *Buszard* (1918), 35 T.L.R. 142.

[2] See p. 69, *et seq.*, *ante*.

[3] See Chapter V, p. 62, *ante*.

other direction by the customer dealing with the moneys in his account.[1]

## DELAY IN PRESENTATION

Stale cheques

The contract entered into by the drawer by the issue of a cheque is enforceable against him for six years from the date of breach, i.e. dishonour, but the presentment for payment should be made within a reasonable time of its issue.[2] If it is not so presented, and the drawer or the person on whose account it is drawn had the right at the time when it ought to have been presented as between him and the banker to have the cheque paid and suffers actual damage through the delay he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such cheque been paid.[3]

Reasonable time question of fact

The question of what is a reasonable time, as always in commercial law, is one of fact. In determining it, regard must be had "to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case."[4] In a series of decisions before the Bills of Exchange Act the following rules were laid down as to what was normally to be regarded as a reasonable time.[5]

Rules as to reasonable time

(1) If the person who receives a cheque and the banker upon whom it is drawn are in the same place, the cheque must, in the absence of special circumstances, be presented for payment on the day after it is received.

(2) If the person who receives a cheque and the banker on whom it is drawn are in different places, the cheque must, in the absence of special circumstances, be forwarded for presentment on the day after it is received, and the agent to whom it is forwarded must,

[1] See *Rekstin* v. *Severo Sibirsko, etc., and Bank for Russian Trade*, [1933] 1 K.B. 47.
[2] Bills of Exchange Act, 1882, s. 45 (2).
[3] *Ibid.*, s. 74 (1).
[4] *Ibid.*, s. 74 (2).
[5] Quoted from Chalmers' note to s. 74 (2).

in like manner, present it or forward it on the day after he receives it.

(3) In computing time, non-business days must be excluded, and, when a cheque is crossed, any delay caused by presenting the cheque pursuant to the crossing is probably excused.

There appear to be no decisions on the matter since the passing of the Act. According to Chalmers[1] the subsection "perhaps introduces a new and less rigorous measure."

Since the Act requires presentment within a reasonable time, it is arguable that if a cheque is not presented within such time it is the duty of the banker upon whom it is drawn not to pay it without obtaining confirmation of the mandate. On the other hand, since the drawer's contract is enforceable against him until six years have elapsed, it is contended that the banker would be justified in paying during the whole of that period.[2] It is, however, the practice of all the banks to refer cheques to drawer when they have become what is called "stale," and in the writer's opinion it must be regarded as the banker's duty to observe this practice. Unfortunately the practice of the banks is not uniform, some referring to drawer cheques which are six months old, and others so acting after a twelve months period. As Paget points out, this makes it impossible to argue that there is a binding legal custom, and it might be that a customer who was unaware of the practice would have a cause of action against his bank on the dishonour of his cheque for this reason. On the other hand, a customer who knew of it could contend that there was an implied duty on his bank to give him the usual warning. As the majority of customers may be assumed to be aware of the practice, the safest course would appear to lie in a continued observance of it.

**Liability of endorsers**

It need hardly be added that the liability of endorsers does not depend upon the same considerations as that of the drawer, and that they will be discharged if the

[1] *Loc. cit.*
[2] This is apparently Paget's opinion: 4th Ed., p. 186.

instrument is not presented for payment within a reasonable time.

The holder of a cheque which has become discharged or partially discharged owing to unreasonable delay in presentment becomes a creditor of the banker to the extent of such discharge.[1] With the concentration of deposit banking in a few great concerns, insolvencies have become very rare, and as actual damage through delay can hardly occur except by reason of insolvency, the practical importance of this section is not great.

## MEASURE OF DAMAGES

Wrongful Dishonour

Refusal by the bank to pay a cheque when the conditions discussed above have been fulfilled amounts to a breach of contract for which the bank is liable to pay damages. The only question will be as to the amount. The ordinary rule for measuring or quantifying damages is that established by the leading case of *Hadley* v. *Baxendale*,[2] viz. that the party in breach must pay the amount of damage which flows directly and naturally from his failure to keep his contract, provided that such would reasonably have been within the contemplation of the parties at the time when they made their contract. There is, however, great difficulty in applying this rule to the contract to honour cheques because it will rarely happen that the banker has any knowledge as to the circumstances under which the customer came to be making payment. Suppose, for example, the customer loses the benefit of an exceptionally profitable contract through the wrongful dishonour of his cheque; is the bank liable to pay him the whole of the loss? There is no decision upon this point, but it is thought that, since possibilities of this kind are obvious, the banker must take the risk of them and is liable.

Damage to reputation

Apart from direct damage of this kind, however, there is also grave danger to the customer's general business and reputation, for persons will not deal with

[1] Bills of Exchange Act, 1882, s. 74 (3).
[2] (1854), 9 Ex. 354.

a man whose cheques are dishonoured. The extent of such damage may, however, be exceedingly difficult to estimate accurately, and it has accordingly been laid down that in such cases the damages are at large, i.e. the jury may award, within reason, such an amount as they think the circumstances warrant without proof of any actual loss.

**ILLUSTRATION. ROLIN *v.* STEWARD[1]**

The plaintiff who banked with a company of which the defendant was public officer (i.e. who was the proper party to be sued) had three cheques and a domiciled bill dishonoured by them owing to the inadvertence of a clerk. They were re-presented and paid next day. The plaintiff brought this action for damages, and gave no evidence to show that he had actually suffered injury. A jury awarded him £500.

*Held:* That the jury were entitled to give substantial damages, though £500 was in the circumstances excessive. £200 was eventually agreed.

Damage to reputation follows almost as a matter of course when the customer is in trade or business, unless, of course, it can be shown that owing to bankruptcy or some other reason the customer's credit is of no business value. In the case of other persons, however, the loss to reputation may be problematical.

**ILLUSTRATION. EVANS *v.* LONDON AND PROVINCIAL BANK[2]**

The plaintiff drew a cheque on her husband's behalf payable to the mess steward of a ship on which he was serving, and owing to a mistake this was dishonoured. There was no suggestion of any actual damage to the plaintiff herself and the jury awarded her one farthing.

It has accordingly been contended[3] that, except in the case of a customer who is in business, actual damage to reputation must be proved before it can be recovered. There is, however, no decision to this effect, though there is a strong dictum in the recent case of *Gibbons* v. *Westminster Bank, Ltd.*[4] There are

[1] (1854), 14 C.B. 595.
[2] (1917) *Legal Decisions Affecting Bankers*, Vol. III, p. 152.
[3] See, e.g. Paget, 4th Ed., p. 178. who strongly supports this view.
[4] [1939] 2 K.B. 882

certainly other classes in the community such as military and naval officers, and professional men to whom the consequences of a dishonoured cheque may be no less disastrous than to the trader. Banks are known to have settled claims made by such customers by making substantial payments, and it is submitted that in such cases the damages are equally at large. When there is proof of actual damage, there is, of course, no doubt that damages are recoverable.[1]

The action for damages for injury to reputation is in the nature of an action for defamation. An action of this latter type will sometimes lie in addition, if the banker is incautious enough, at the time of dishonouring the cheque, to give his reasons for doing so. These are not infrequently indicated upon the cheque itself. It has even been suggested[2] that the mere act of wrongfully dishonouring a cheque is defamatory of the drawer. This view, however, appears to the writer to be unsound. At the most, such action would amount to an implied slander and would need proof of actual damage to support it, except where it could be shown to affect the drawer by way of his trade, business, or profession. But, in the latter event, the cause of action can hardly be differentiated from that already dealt with.

Since, as has been indicated, the reason for dishonour is usually given on the cheque, or upon a slip of paper returned with it (this procedure is indeed required by the rules of the Clearing House), it has become a common practice in an action for wrongful dishonour to add a claim for damages for libel. In some of these cases the two claims have been dealt with without differentiation,[3] while in others there have been findings on both claims.[4] Generally speaking, the amount awarded as damages under either head will probably be the same. But if it be correct that only a trader

[1] See per Williams, J., in *Rolin* v. *Steward, supra*, at p. 607.
[2] See *Allen* v. *London County and Westminster Bank* (1915), 31 T.L.R. 210.
[3] Cf. *Allen* v. *London County and Westminster Bank, supra*.
[4] Cf. *Szek* v. *Lloyds Bank* (1908), *Legal Decisions Affecting Bankers*, Vol. II, 159, where the jury awarded £250 for the breach of contract and nothing for the alleged libel.

can recover damages for wrongful dishonour, it might be possible for a non-trader to recover by framing his action in libel only, as was done in *Davidson* v. *Barclay's Bank, Ltd.*[1] So long as bankers continue the practice in question they must expect occasional actions against them framed in libel. They should therefore make their remarks as colourless as possible. The form of words most commonly used, viz. Refer to Drawer (sometimes abbreviated to R/D), appears at first sight to fulfil the requirement, but it is possible to place various interpretations or, as they are called technically, "innuendos" upon these words. In one case the judge directed the jury that they meant no more than that the cheque had been dishonoured,[2] but left it to them to say whether they thought this libellous and they thereupon gave no damages. In the only other case upon these words[3] the position was affected by the war-time moratorium. A list of forms of words commonly used by the banks is given by Dr. Minty in *The Law Relating to Banking and Foreign Exchange*,[4] several of these such as *Discharge Required*, *Discharge Irregular*, would appear to be incapable of a defamatory meaning.[5]

[1] [1940] 1 All E.R. 316.
[2] *Szek* v. *Lloyds Bank*, *supra*.
[3] *Flach* v. *London and South-Western Bank* (1915), 31 T.L.R. 334.
[4] 2nd Ed., p. 198.
[5] The abbreviations D/R, D/I, etc., are said now to have become obsolete.

## CHAPTER VI

## DISCOUNTING BILLS AND COLLECTING CHEQUES AND OTHER NEGOTIABLE INSTRUMENTS

THE position of a banker discounting bills, cheques, or other negotiable securities for a customer differs fundamentally from that of a banker collecting his customer's cheques. But the actual processes have points of similarity and the distinction may be difficult to draw in practice, so that it seems desirable to treat of the whole subject in one chapter.

To discount a bill is in effect to buy it, and if the names on it be good and the price favourable such purchases are a remunerative type of business, which has been carried on by merchants and merchant bankers from very early times.[1] With the rise of banking, customers took to leaving the bills, notes and other securities of which they were holders with their bankers in order that the necessary presentation might be made, and the amounts received would then be credited to their accounts. The banker was willing to do this without charging any commission because he obtained thereby the use of the money received for a longer or shorter period. With the growth of the cheque system this type of business naturally increased enormously, and when crossings were invented, and later given statutory recognition in the Crossed Cheques Acts and the Bills of Exchange Act, 1882, it became for practical purposes obligatory on bankers to afford this service to their customers. It seems, however, to have been a long time before the question seriously arose whether a banker who acted in this way was in reality acting as a mere agent for the customer, or was still playing

[1] The term "sale," however, is sometimes used by lawyers to describe the transfer of an instrument without endorsement while among merchants it is usually confined to the purchase of drafts for remittance abroad. (See Chalmers, *op. cit.*, p. 101.)

his old role as a discounter. Before concerning ourselves with the answer to this question, it will be as well to refer shortly to the legal position which arises on each hypothesis.

Discount

The discounter of a bill or note becomes a holder for value and takes the property in the instrument. Whether he takes his title free of the equities depends on whether he is a holder in due course.[1] If he is a holder in due course, he is protected against the frauds, conversion, and defects of title of his customer equally as against those of other parties to the instrument: he is in fact quite independent of his customer, and this may be of considerable advantage to him.[2] He must present for acceptance (where necessary), and for payment (where not excused), and on dishonour must protect his position by giving the necessary notices in accordance with the statutory requirements. A banker discounting bills for a customer which bear the customer's endorsement is, of course, well placed for estimating the value of that signature in the event of the acceptor failing to pay. He will remember to obtain this endorsement even if the bill in question is payable to bearer since in its absence the customer is not liable on the bill, and does no more than warrant that the instrument is what it purports to be, i.e. that it is in fact a genuine bill of exchange, that he has the right to transfer it, and that at the time of the transfer he is not aware of any fact which renders it valueless.[3]

## COLLECTION

Agency

An agent who is employed to collect a bill or note has no legal interest in the instrument but holds the proceeds in trust for his employer: a banker, however, collects cheques for a customer on the implied agreement that the proceeds will be credited to his account: that is, that the money will be lent by the customer to the banker as soon as received, but not until received.

[1] See Bills of Exchange Act, 1882, s. 29.

[2] See the defence in *Underwood* v. *Barclays Bank*, [1924] 1 K.B. 775, which, however, failed on the facts. See p. 117, *post*.

[3] Bills of Exchange Act, 1882, s. 58 (2).

**ILLUSTRATION. RE FARROW'S BANK**[1]

Farrow's Bank received a cheque from a customer for collection. Not being a clearing bank, they sent it to their agents, Barclay's Bank, to pass through the Clearing House. On receipt, the latter bank credited Farrow's Bank with the amount of the cheque in the clearance sheet but they did not settle the matter with the drawee bank until later. In the interval Farrow's Bank had suspended payment. The question then arose whether Farrow's Bank had at the time of suspending payment received the money so that it became part of their general assets, giving the customer only a right to recover a dividend or whether the proceeds still belonged to him *in toto*. If the cheque had been discounted, the customer would have ceased to be the owner.

*Held:* That the time, at which the money would have become that of Farrow's Bank was that of the actual time of clearing, i.e. at the time when the transfer takes place at the Bank of England. The fact of the amount having been credited in account beforehand was immaterial, and the money therefore belonged to the customer.

Normally, therefore, a banker collecting a cheque is in a dual position since he is not acting merely as an agent but also for his own purposes. The tendency of the Court in certain of the cases has been to keep the two aspects of the matter in separate compartments, and it is this which explains the great controversy over Sect. 82 of the Bills of Exchange Act, 1882, which was resolved by the House of Lords against the banks in the leading case of *Capital and Counties Bank* v. *Gordon.*[2] What we may consider a juster appreciation of the position appears in Lord Birkenhead's judgment in *Sutters* v. *Briggs*,[3] where he shows that the positions of agent and holder are not in these cases really inconsistent. Following the *Gordon Case*, as we must, however, it is necessary to accept and apply the distinction to the collection of cheques by bankers.

The agent while employed in the business of collection is a mere instrument or conduit pipe and normally incurs no personal responsibility in connection with

[1] [1923] 1 Ch. 41.
[2] [1903] A.C. 240.
[3] [1922] 1 A.C. 1.

his act, but like any other agent or servant he is liable for any torts which he commits in the course of his work. An agent who incurs personal liability while properly carrying out the work for which he is engaged is entitled to be indemnified by his principal. There is one tort to the innocent commission of which a banker is peculiarly exposed when collecting cheques or negotiable securities for a customer, that of conversion. When the customer has no title to the cheque, its collection by his bank amounts to conversion.[1] This most commonly occurs where there has been forgery of an endorsement but it is not confined to such cases, and might happen owing to some fraudulent conduct by the customer, as when he had stolen or converted the instrument to his own use: in such a case the banker's position is weaker than if he had given value for the instrument.

**ILLUSTRATION. G. L. UNDERWOOD, LTD. *v.* BARCLAYS BANK[1]**

A had a banking account with the defendants. He was also sole director of the plaintiff company in which he held all the shares except one belonging to his wife. The company's account was kept at another bank. The defendants knew of the existence of the plaintiff company but were unaware of its separate account. A, as sole director, became possessed of various cheques payable to the company which he endorsed on the company's behalf and paid into his own account with the defendants. They collected the cheques and credited the proceeds to his account, and he afterwards misappropriated them. The company later went into liquidation and the liquidator brought this action to recover the amount of the cheques in question. The defendants claimed to be holders in due course.

*Held:* The defendants had, by collecting these cheques, been guilty of conversion and were liable to the plaintiffs.

It is obvious that this places a considerable burden upon banks. It is, of course, true as has been mentioned above, that in cases where the bank is liable, a right exists to be indemnified by the customer, but this may involve taking legal proceedings against him, and even

[1] *G. L. Underwood, Ltd* v. *Barclays Bank*, [1924] 1 K.B. 775.

so in many cases it will not be possible to enforce the judgment owing to the customer's insolvency. The banker acting as agent may, therefore, as has been pointed out above, be in a worse position than if he had given value for the instrument.

## PROTECTION OF COLLECTING BANKER

When the system of crossings was recognised by statute in the Crossed Cheques Act, 1876, the banks were, subject to certain conditions, given protection against these risks while collecting crossed cheques for customers.[1] This was in recognition of the fact that the statute virtually placed an obligation upon them to undertake the collection of crossed cheques. This protection is now contained in Sect. 82 of the Bills of Exchange Act, 1882, which however only covers the banker while acting as his customer's agent for collection, and not when collecting on his own behalf as holder for value.[2]

The section provides as follows—

> Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment.

This is an important section, and must be constantly borne in mind by the responsible servants of the banks. The following points must be noticed—

(i) It is the banker, *prima facie* liable at Common Law, who claims to be protected by the section. This means that it is for him to satisfy the Court that the various requirements of the section have been fulfilled, e.g. he must accept the onus of proving that he has not been negligent: it is not for the true owner to prove negligence.[3]

[1] Crossed Cheques Act, 1876, s. 12, proviso.
[2] *Capital and Counties Bank* v. *Gordon*, [1903] A.C. 240, and see below, p. 136.
[3] See *Lloyds Bank* v. *Chartered Bank of India*, [1929] 1 K.B. 40 at p. 59.

(ii) The protection is given in relation to the collection of crossed cheques only, although by Sect. 95 this is extended to cover dividend warrants, and by the Revenue Act, 1883, to a still wider category of instruments.[1]

At first sight it would seem that this difficulty could easily be surmounted by the simple expedient of crossing all cheques handed in for collection, and it is conceived that Sect. 77 (6) was inserted in the Bills of Exchange Act, 1882, in order to remove any doubts as to a banker having the right to take this course. This subsection provides that "where an uncrossed cheque, or a cheque crossed generally is sent to a banker for collection, he may cross it specially to himself." It will be observed that the word "sent" is used, not the word "brought." If the cheque be brought by the customer, the banker can always insist that it be crossed before he be required to accept the risk of collecting it. If it be sent, whether by servant or by post, he would have to refer back the matter of crossing, which would cause delay, and the most reasonable procedure in the circumstances would be for the banker to cross it himself. Quite apart from this section there would appear *prima facie* to be no reason why he should not do so, since as an agent he should take all reasonable precautions, and, in *Sutters* v. *Briggs*,[2] Lord Birkenhead, L.C., states the opinion that this is indeed so. Nevertheless the view is commonly held that a banker cannot obtain the protection of Sect. 82 by himself crossing an open cheque sent to him for collection but that the cheque must already be crossed when it comes into his hands.[3] This view appears to originate in a dictum of Lord Lindley in *Capital and Counties Bank* v. *Gordon*,[4] where he says "that Sect. 82 would be deprived of all meaning if it were held to apply to cheques not crossed when they

[1] See Chapter VII, p. 152, *post.*
[2] [1922] 1 A.C. 1.
[3] See Paget, *op. cit.*, p. 282, where he says this view must now be taken as "finally settled." See also Chalmers, *op. cit.*, 305.
[4] [1903] A.C. 240.

come to the hands of the party seeking the protection of that section. Sect. 77 (6) does not assist the appellant bank in the present case although it might be useful if an endorsement were forged after a crossing." This opinion is not of binding effect for it was not necessary to the decision since it was held on the facts that the defendant bank were holders for value, not agents.[1] It is, moreover, in disagreement with the view of Stirling, L.J., in the Court of Appeal.[2] In the writer's opinion, therefore, this question cannot be regarded as definitely decided though great weight attaches to Lord Lindley's dictum.

**Receives payment**

(iii) The protection is in words limited to the receipt of payment. Receipt of payment, however, does not take place until the final act in the clearing, i.e. the crediting of amounts in the books of the Bank of England,[3] and is preceded by a number of acts on the part of the collecting bank in relation to the cheques which themselves amount to conversion if the customer has no title. To place a literal construction on the words "receives payment" would therefore be to nullify the value of the section, indeed would make it a mere "trap."[4] The process of receiving payment is therefore held to cover all acts ancillary to the collection of the cheque in question, and even extends beyond this to such preliminary matters as the opening of the customer's account.[5] The duty of good faith and care imposed on the banker must be observed over a precisely similar period, and it is submitted that the statement of Lord Reading, L.C.J., in *Morison* v. *London County and Westminster Bank*,[6] that Sect. 82 "only comes into operation when the banker receives the proceeds," can be disregarded in view of later decisions such as *Lloyds Bank* v. *Savory & Co.*[7]

[1] See p. 136, *post.*
[2] See [1902] 1 K.B. at p. 208.
[3] See *Re Farrow's Bank, supra.*
[4] See *per* Lord Macnaghten in *Capital and Counties Bank* v. *Gordon*, [1903] A.C. 240 at p. 244.
[5] See, p. 124, *post.*
[6] [1914] 3 K.B. 356.
[7] [1933] A.C. 201.

(iv) The collection or receipt of payment must be for a customer. Here we are faced with the important and difficult question of who is to be regarded as a customer. This has already been discussed mainly in the light of the decisions on this section,[1] which show (*a*) that something in the nature of an account must actually have been opened, and (*b*) that as soon as this has been done, the relationship of banker and customer automatically arises. Meaning of Customer

It is possible for a question to occur as to whether payment is being received for a customer when, as frequently happens with present-day concentration of banking, both drawer and payee of a cheque are customers of the same bank. It might then be argued that the banker was acting as paying banker rather than as collecting bank and was outside the section. This is a question of fact which can seldom cause difficulty.

When the cheque is paid in in the ordinary way and credited to the customer's account, there can be little doubt that the bank receives payment from itself for its customer. It is possible, however, to imagine a case where the payee being in a hurry asked for payment over the counter: here there would be no question of collection. Usually it will be quite immaterial in which pair of shoes the banker stands,[2] but if he happens to be claiming a lien on the balance of the drawer's account the point may be important, for if he has received the cheque for collection it is arguable that he must pay it in preference to exercising his lien.[3]

(v) The collection must be effected by the banker in "good faith."[4] Good faith

[1] See pp. 29, *et seq.*, *ante* and *Great Western Railway* v. *London and County Bank*, [1901] A.C. 414, *Ladbroke* v. *Todd* (1914), 19 Com. Cas. 256; *Commissioners of Taxation* v. *English, Scottish, and Australian Bank*, [1920] A.C. 683.

[2] See *Carpenters' Company of the City of London* v. *British Mutual Bank* (1937), 53 T.L.R. 276, where the point is discussed under both heads.

[3] Cf. *Kilsby* v. *Williams* (1822), 5 B. and Ald. 815.

[4] As to this see p. 89, *ante*.

## NEGLIGENCE UNDER SECTION 82

Negligence

(vi) The collection must have been effected by the banker "without negligence." The protection afforded to bankers by Sect. 82 is conditional on due care having been exercised; therefore establishing a duty which does not exist at Common Law since there is no contractual relationship between the banker and the true owner of the cheque. On a strict construction of the section, the banker would appear to lose the benefit of Sect. 82 whenever he receives payment negligently, even if the negligence of which he is found guilty did not occasion the loss complained of.[1]

The question of standard of care is best studied in the light of the decided cases, but as a matter of general principle some difficulty has been found in obtaining a general formula. The view commonly accepted is that it is "the standard derived from the ordinary course of banking."[2] This, however, is clearly not conclusive because practice cannot make that which is improper proper: "neglect of duty does not cease to be, by repetition, neglect of duty."[3] It must be remembered that the inclination of judges is always to demand a very high standard of care from those, such as bankers, upon whom great responsibility rests, yet, as has been said, bankers cannot be expected to make microscopic investigations and play the role of amateur detectives.[4]

The conception of negligence in this section gives rise to difficulty both of a legal and of a practical character. Negligence may be shortly defined as "absence of due care in the circumstances," but in order that a person who has suffered damage from the negligence of another may successfully proceed in an

[1] See per Greer, L.J., in *Savory & Co.* v. *Lloyds Bank*, [1932] 2 K.B., at p. 148, but see *per* Lord Buckmaster in [1933] A.C., at p. 216.

[2] See *Byles on Bills*, 19th Ed., p. 39; and see *per* Lord Dunedin in *Commissioners of Taxation* v. *English, etc., supra*, at p. 689, "the ordinary practice of bankers." Again, "the case that a reasonable business man would bring to bear upon similar business of his own," Sankey, J., in *Lloyds Bank, Ltd.* v. *Chartered Bank of India*, [1929] 1 K.B. 40.

[3] See *per* Lord Tomlin in *Bank of Montreal* v. *Dominion Gresham Guarantee Co.*, [1930] A.C. 359 at p. 666.

[4] *Lloyds Bank* v. *Chartered Bank of India*, *supra*, at p. 59.

action against him, he must show that the negligent person was under a duty to him to take care. A duty to take care may arise from a contract between the parties as between banker and customer, or from the general law of torts as in the familiar case of driving a vehicle on the highway. In the latter type of case the duty is a general one, and is owed to all citizens: in the former type it is a special one, owed to one or a group of persons who are parties to a contract. Sect. 82 at first sight appears to establish a duty of a general kind for it does not explicitly state that the collecting banker must exercise care as to the interest of any particular person. This, however, can hardly have been the intention of the legislature. The banker is protected from liability to a particular person, viz. "the true owner" of the instrument, and it must therefore be towards him that the duty to take care is imposed. In the words of Kennedy, L.J.,[1] "it means without want of reasonable care in the interests of the true owner." The true owner is the person who last in the history of the instrument can establish his title as holder, so that he is not necessarily the person from whom an instrument has been stolen, as in *Smith* v. *Union Bank of London*,[2] where a bearer cheque was stolen and negotiated to a holder in due course (a person who takes under a forged endorsement is not a holder).[3]

The duty to the true owner is hardly susceptible of definition in general terms, but it is obvious that it depends to a "considerable extent on the nature of the dangers by which the interests of the true owner are threatened."[4]

The circumstances surrounding the operation of receiving payment are so various (bearing in mind the wide construction which has been given to that expression) that the possible instances of negligence are almost without end. It is, however, possible and useful

[1] *Hannan's Lake View* v. *Armstrong* (1900), 5 Com. Cas. 188 at 191.
[2] (1875), 1 Q.B.D. 31.
[3] See Paget, *loc. cit.*, pp. 233, *et seq.*, on the subject of "true owner."
[4] Scrutton, L.J., in *Savory & Co.* v. *Lloyds Bank*, [1932] 2 K.B. 122.

to attempt the analysis of them into various groups—

Opening the account

A. In the first place there are acts and omissions in connection with the opening of the account. At first sight it may seem a far cry from the opening of a customer's account to the receiving of payment in respect of a particular cheque possibly several years later. Examination, however; shows that in many cases vigilance can only be effective at the initial stage, and it would be unfair to allow the section to protect a banker who opens accounts for Tom, Dick, or Harry without inquiry, thus making possible kinds of fraud which the exercise of all proper precautions at a later stage could not prevent. It is, however, only comparatively recently that the Courts have dealt with the question of the banker's duty at the opening of the account, and its precise extent is still by no means clear. The first suggestion that the banker's responsibility might extend so far back as this appears in 1903 in *Turner* v. *The London and Provincial Bank*,[1] where the customer's references had not been taken up. In this case, however, no definite decision was given on this point, and in his note to the case Sir J. Paget expressed his view that the lack of inquiry was "somewhat remote from the actual transaction." *Ladbroke* v. *Todd*,[2] *Guardians of St. John, Hampstead* v. *Barclays Bank*,[3] and *Commissioners of Taxation* v. *English, Scottish, and Australian Bank*[4] were all cases where no or very indefinite inquiries were made at the opening of the account and the cheque to which the customer had no title was paid in for collection very shortly afterwards. In all these cases this was held to have been such negligence as disentitled the banker from relying on Sect. 82.

**ILLUSTRATION. LADBROKE v. TODD[5]**

The plaintiffs, bookmakers, drew a cheque payable to R. H. Jobson and crossed "account of payee only," and

[1] *Legal Decisions Affecting Bankers* (1903), Vol. 2, p. 33.
[2] (1914), 30 T.L.R. 433.
[3] (1923), 39 T.L.R. 229.
[4] [1920] A.C. 683.
[5] (1914), 19 Com. Cas. 256, and see p. 31, *ante*.

sent it in a letter to the payee who was an undergraduate. The letter was stolen and the cheque abstracted, and taken, bearing a forged endorsement in the name of R. H. Jobson to the defendant who carries on business as a banker, by a young man who said that he was the payee and wished to open an account with it. He explained that he had an account at another bank, but that he did not wish to pass this cheque, which he had received in payment of a betting debt through his account there, lest it should come to the knowledge of the college authorities. The defendant required him to sign his name in a signature book, and compared this signature with the endorsement on the cheque. He took no other precautions, such as requiring references. The cheque was cleared specially the same day, and the greater part of the proceeds drawn out next day. In an action by the drawers of the cheque,

*Held:* The cheque had been collected for a customer, but that the payment had been received negligently, and the defendant was therefore liable.

What inquiries are necessary

The area of necessary inquiry at the opening of an account, however, has become much wider than the mere requirement and taking up of references, and it is not possible at the time of writing to define it with precision. The use of banking facilities at the present day has become so widespread and has penetrated so far into social strata where banking accounts were previously unknown, that new precautions have become necessary. The dishonest employee is perhaps the greatest danger from this point of view. The problem is to prevent such persons making use of banking accounts for the encashment of stolen cheques. It is obvious that the banker can play a considerable role in the solution of this difficulty, and in fact bankers have not been slow to assume the responsibility of devising precautions against being used for the collection of such cheques. It may therefore seem hard that the Courts have come to expect the taking of such precautions, and to hold failure in this respect to be negligence.

It has accordingly become necessary for the banker to inquire as to the occupation of his would-be customer, and, in the event of its appearing that he is an employee,

to ascertain the name of his employer.[1] If with this knowledge the banker collects a number of cheques payable to the employer's order, or even payable to the employer or bearer, for the credit of the employee's account without making inquiry and satisfying himself on reasonable grounds that they are indeed the property of the employee, he is guilty of negligence.[2] For similar reasons the occupation of a married woman's husband must be ascertained, and if he be an employee a similar procedure must be followed.[3]

**ILLUSTRATION. LLOYDS BANK *v.* SAVORY & CO.**[4]

Crossed bearer cheques stolen by clerks from their employers, the plaintiffs (Savory & Co.), were paid by them into the head office of the defendant bank for collection, and for the credit of accounts at local branches. Pay-in slips were filled in with the names of the clerks and the local branches in question. The account at one branch was in the name of one fraudulent clerk and at the other in the name of the other clerk's wife. The names of the clerk's employers or of the employers of the customer's husband had not been obtained when these accounts were opened.

*Held:* This was negligence and the defendants were liable to the plaintiffs, the true owners.

**Scrutiny of account**

It may also be that the banker is under the duty to scrutinise and consider his customer's account from time to time so as to assure himself that it is in order and that there are no circumstances calling for inquiry.[3]

**Collection for employees**

As has been said "experience has shown that one such threat (i.e. to the interests of the true owner) is the risk that a servant of the true owner will misappropriate a cheque made payable to his employer."[4] This matter may, however, be stated more broadly—

[1] The rule at Lloyds Bank on the matter provides: Rule 29. "No new current account should be opened without knowledge of, or full inquiry into, the circumstances and character of the customer." See *Savory & Co. v. Lloyds Bank*, [1932] 2 K.B. 122.

[2] See *Lloyds Bank* v. *Savory & Co.*, [1933] A.C. 201.

[3] See dictum by Sankey, L.J., in *Lloyds Bank* v. *Chartered Bank of India, supra*, at p. 70, where he bases himself on *Morison* v. *London County and Westminster Bank*, [1914] 3 K.B. 356, but this case does not appear to lay down any such rule.

[4] *Per* Scrutton, L.J., in *Savory & Co.* v. *Lloyds Bank*, [1932] 2 K.B. 122, at p. 130.

a banker collecting a cheque or other instrument for a person whom he knows to be an employee, must, when such instrument shows on its face that the employer has once had a legal interest in it, assure himself beyond reasonable doubt that the employee is fully entitled to have it collected for the benefit of his private account, and is not holding it in fraud of his employer. The term "employee" is here used very broadly and includes not only clerks and servants, but agents and officials of corporations such as company directors.[1] The interest of the employer will usually arise as the original payee of the instruments but possibly as endorsee, or even in some cases as drawer, e.g. where the drawing was by procuration.

### ILLUSTRATION 1. MORISON *v.* LONDON COUNTY AND WESTMINSTER BANK[2]

One, Abbot, was a clerk, and later manager to the plaintiff, who was an insurance broker. He had authority from his master to draw cheques "*per pro.*," and the defendants who kept the plaintiff's account had instructions to honour cheques so drawn. Abbot opened an account with the defendants without the plaintiff's knowledge, and over a number of years paid cheques into it which he had drawn, and in some cases endorsed "*per pro.* Morison." The defendants collected these, which were mostly crossed, and credited them to Abbot's account.

*Held:* That when considering whether the bank had acted without negligence, the fact that the cheques were signed *per pro.* was one circumstance to be taken into account and that in conjunction with the facts that Abbot was known to be manager for the drawer and appeared eventually as holder, it put upon the bank the obligation of making inquiries which were in fact never carried out. The bank had in the circumstances been negligent.

### ILLUSTRATION 2. LLOYDS BANK *v.* CHARTERED BANK OF INDIA[3]

One, Lawson, who was chief accountant at the plaintiffs' Bombay office, was authorised by them to draw cheques on another bank with which the plaintiffs had an account.

[1] *Underwood* v. *Bank of Liverpool*, [1924] 1 K.B. 775.
[2] [1914] 3 K.B. 356.
[3] [1929] 1 K.B. 40.

He made use of this power to conduct an extensive series of frauds. He drew cheques payable to the defendants with whom he had a private account and sent these to them to be credited to it. The defendants collected and credited the sums in question. Eventually the frauds were discovered, and the plaintiffs sued the defendants in conversion.

*Held:* The defendants had been negligent in not making inquiries when they had before them the following circumstances which should have roused suspicion: (*a*) large sums had been transferred to them without any apparent cause; (*b*) this had been done by cheques signed by one who to their knowledge was an officer of the plaintiffs; (*c*) these cheques were drawn not upon any banking account of the person signing, but on an account which the plaintiffs had with another bank; (*d*) the drawer of the cheques, the person who gave directions with regard to the application of the cheques, and to whose credit the defendants were to place them, were one and the same person; (*e*) finally, as soon as the cheques were credited as directed large sums were drawn against them by the same person in favour of payees whom the defendants knew to be stockbrokers.

The fact that the agent drawing the cheques has a power of attorney under which he draws cheques to his own order does not remove the need for inquiries.[1]

The more serious danger, however, is the collection of cheques for an employee which were originally payable to or to the order of his employers. So much is this so that it is a rule of present-day banking practice that such cheques should only be collected after investigation.[2] The necessity of such a rule is emphasised by the number of decisions under Sect. 82 in which this matter has been involved.[3] Partnership cheques would appear to come under the same rule, and should not be collected for the private account of a partner without inquiry.

**Cheques payable to public authorities**

A somewhat similar type of case is that of a private person paying in for collection a cheque which was

[1] *Midland Bank* v. *Reckitt*, [1933] A.C. 1.

[2] See *Lloyds Bank* v. *Savory & Co.*, [1933] A.C. 201.

[3] See *Lloyds Bank* v. *Savory & Co.*, *supra*; *Underwood* v. *Bank of Liverpool*, [1924], 1 *K.B.* 775.; *Hannan's Lake View* v. *Armstrong* (1900), 16 T.L.R. 236; *Bissell & Co.*, v. *Fox Bros. & Co.* (1884), 51 L.T. 663; *Bevan* v. *National Bank* (1906), 23 T.L.R. 65; *Morison* v. *London County and Westminster Bank*, p. 125, *ante*.

made payable in the first instance to a public authority. One would not expect to find such an instrument in the hands of a private individual, and the circumstances clearly call for inquiry.

### ILLUSTRATION. ROSS *v*. LONDON COUNTY AND WESTMINSTER BANK[1]

A sergeant employed in the offices of the Overseas Military Forces of Canada stole thirty-two cheques worth £3900 over a period of ten months. Each was drawn payable to "Officer in Charge, Estates Office, Canadian Overseas Military Forces." The cheques were crossed and were all endorsed by the payee preparatory to being sent to the Paymaster-General of the Forces. The sergeant had a small private account with the defendants into which the cheques were passed without inquiry and collected. The Paymaster brought proceedings.

*Held:* The defendants had been put on inquiry by the circumstances and had been negligent in failing to investigate.

Trustees

Cases where a trustee, guardian, or other person in a fiduciary position pays into his own account instruments drawn payable to his *cestui que trust* give rise to more difficulty. Although there appear to be no decisions directly in point, it is submitted that the bank should observe the same precautions as have been mentioned above. In *House Property Co. of London* v. *London, County and Westminster Bank*[2] a cheque made payable to "T.C. and others or bearer" was crossed "a/c payee." "T.C. and others" were trustees and the cheque was misappropriated by their solicitor who had it collected through his private account. The defendants were held liable on the grounds that they had disregarded "a/c payee," but the judge clearly also attached importance to the fact that it had been collected for the private account of a solicitor. A trustee will normally, of course, receive cheques made payable to himself. If he is described in them as trustee, the same rule would appear to apply, and it would be dangerous to credit the cheques to any but a

[1] [1919] 1 K.B. 678.
[2] (1915), 31 T.L.R. 479.

trust account. When the cheques are made payable to the trustee without designation as such, the bank obviously cannot be expected to make inquiries, unless possibly it is known to the manager that they in fact constitute trust funds.

Negligence at time of collection

Carelessness is perhaps most likely to occur at the time of the collection, especially in failure to pay due attention to the actual terms of the mandate. It is not here a case of playing the detective but of a careful examination of everything which appears on the front and back of the instrument. Each set of circumstances produces its own requirements, but several factors of a recurrent character may be noticed—

(*a*) *Endorsements.* The most obvious need of all is for the bank officer to make sure that the endorsement corresponds exactly with the name of the payee or endorsee. The rules on this point have already been considered,[1] and do not call for further discussion. Collecting bankers are perhaps inclined to leave this matter to the paying bank, but it is clear that they are themselves responsible for ascertaining that endorsements are in order.

**ILLUSTRATION. BAVINS *v.* LONDON AND SOUTH WESTERN BANK[2]**

The plaintiffs were payees of an instrument in the form of a cheque but containing a conditional order. It was payable to J. Bavins, Jun., and Sims. This was stolen and eventually paid into a customer's account at the defendant bank bearing a half illegible endorsement which the bank considered to be that of J. Bavins, Trench, and Sims. It was collected and credited to the customer's account.

*Held:* Assuming that the instrument came within Sect. 82 of the Act, the defendants had been negligent in not detecting that the endorsement was not in the name of payee, and were not therefore protected by the section.

Crossings

(*b*) Again, any failure to pay attention to the crossings will be negligence. It is very unlikely that a banker will try to collect a cheque crossed specially

[1] See pp. 77, *et seq.*, *ante.*
[2] [1900] 1 Q.B. 270.

to some other banker than himself, except when he acts as agent. The markings "not negotiable" and "account payee" however require examination. The words "not negotiable" are a warning to holders that they take subject to defects of title in their transferors.[1] It is therefore argued that the banker collecting for such person must exercise care. This, however, confuses the position of a collecting with that of a discounting banker. There seems to be no good reason for putting upon a collecting banker, who is simply acting as an agent, the almost impossible duty of investigating titles prior to that of the customer. Sect. 82 in effect acknowledges such impossibility, and if "not negotiable" cheques were to be taken out of the protection which it affords it would be a case of giving with one hand and taking away with the other. **Not negotiable**

### ILLUSTRATION. CRUMPLIN *v.* LONDON JOINT STOCK BANK[2]

The plaintiff was a stockbroker who employed a clerk called Rands. Rands indulged in speculative transactions with the plaintiff in the name of a customer Davies, the plaintiff being unaware of what was going on. The plaintiff signed a number of cheques made payable to Davies or order and crossed "not negotiable" which Rands took and, having forged an endorsement in the name of Davies, had them collected by the defendants with whom he had an account. The plaintiff sued the defendants who relied upon Sect. 82. It was contended that the defendants should not have collected "not negotiable" cheques for any person other than the payee without inquiry, and had therefore been negligent.

*Held:* The defendants had not been negligent in failing to make inquiries and were protected by Sect. 82.[3]

The words "account payee" or "account payee only" or "account John Smith" (the last-named formula being most commonly used in bearer instru- **Account payee**

1 Bills Exchange of Act, 1882, s. 81, and see pp. 53, *et seq.*, *ante*.

2 (1913), 19 Com. Cas. 69.

3 In *G.W.R.* v. *London and County Bank*, [1901] A.C. 414, at p. 442, Lord Brampton expressed a view contrary to this, but the opinion was given in passing and without serious consideration of the point involved. It is submitted that the point is clear, unless, of course, there are other matters which call for inquiry.

ments) are now frequently found upon crossed cheques. The practice of marking crossed cheques in this way originated at any rate before 1852,[1] but has only become common during the present century. Each set of words seems to have exactly the same effect, and this is to put upon the bank the duty of making a careful and satisfactory inquiry before collecting the instrument for the account of any person other than that of the payee indicated. A failure to observe this duty is negligence within Sect. 82, and deprives the bank of protection.

**ILLUSTRATION. BEVAN *v.* NATIONAL BANK**[2]

The plaintiff carried on a business in the name of Malcolm Wade & Co., Wade being the manager. A number of cheques payable "Malcolm Wade & Co. or order" and crossed "account of payees" were received by Wade, who endorsed them and paid them into his own account with the defendants who collected them and credited him with the amounts. In the resulting action the defendants relied on Sect. 82.

*Held*: The words "account payee" were a direction to the receiving banker that the drawer desired to pay the particular cheque into the bank which kept the account of the payee. To disregard a direction of that kind was negligence.[3]

As has already been stated,[4] the effect of these words depends entirely on judicial decision, since they are nowhere referred to in the Act. The result is from a legal point of view very curious, because its effect is to enable the drawer to give an effective instruction to a banker with whom he is not in contractual relationship. In spite of much adverse criticism[5] there can be little doubt that the result is very valuable to the general public since it makes possible the sending of cheques through the post with a safety almost complete while it does not put an undue strain upon banks.

[1] See *Bellamy* v. *Marjoribanks* (1852), 7 Ex. 389.

[2] (1906), 23 T.L.R. 65.

[3] See also *Morison* v. *London County and Westminster Bank*, *supra*, *per* Lord Reading and *House Property Co. of London* v. *London County and Westminster Bank*, *supra*.

[4] See above, p. 103.

[5] See especially Paget, *op. cit.*, p. 259.

The collection of an "account payee" cheque for a person other than the payee named is only *prima facie* evidence of negligence as it does not conclusively prove negligence. It may be rebutted by showing that inquiries were made, and that the explanation was reasonably satisfactory. In some circumstances indeed it may be unreasonable to expect the banker to make inquiries, e.g. where he, the collecting banker, is acting as clearing agent for another bank from which he has received the cheque for collection.[1]

(*c*) *Per pro.* and other delegated drawings or endorsements may make inquiry necessary, a matter already dealt with at pages 81 and 96 above.

(*d*) The actual circumstances at the time of paying in for collection might give rise to suspicion. If, for example, the first cheque so paid in after the opening of the account was a very large one, the banker would probably be expected to make inquiries. This matter was argued in *Commissioners of Taxation* v. *English, Scottish, and Australian Bank*,[2] but the sum there involved was £700 only.

**General**

A historical survey of the cases on negligence in connection with Sect. 82 would show that it is a conception which has been continually expanded until in *Lloyds Bank* v. *Savory & Co.*[3] a position has been reached which has caused much difference of judicial opinion as well as serious perturbation among bankers. It is by no means certain, however, that the limit of the banker's obligations has been reached, and it would be unwise to assume that the categories of negligence discussed in the foregoing pages exhaust the possibilities.

**Contributory negligence**

In an action founded on negligence, it is a good defence for the defendant to show that the plaintiff's own negligence was a contributory factor in causing the damage complained of. Contributory negligence

[1] *Importers Co.* v. *Westminster Bank*, [1927] 2 K.B. 297, where the defendants were acting for a foreign banker. It is submitted that all clearing agents are covered by the decision, any other view would, in the words of Bankes, L.J., at p. 302 "render this class of business altogether impossible."

[2] [1920] A.C. 683.

[3] [1933] A.C. 201.

has given rise to great difficulties in the law of torts, which naturally cannot be discussed here. In any case it is very doubtful whether the doctrine can be applied to cases coming under Sect. 82. The section makes absence of negligence on the part of the banker a condition precedent to the protection given, and it would not therefore at first sight appear to be material that there has been contributory negligence by the true owner. It has in fact been doubted whether there can be contributory negligence on the part of the true owner since he is not in contractual relationship with the collecting bank and therefore owes no duty; and this may well be so, though it is possible that the duty imposed by Sect. 82 might be regarded as reciprocal. The true owner's conduct, however, may have been so negligent as to make the conduct of a banker who has failed to make inquiries appear reasonable in the circumstances. It is then not really a question of contributory negligence, but of additional facts which prevent *prima facie* negligence in the banker from actually being held to be negligence in the circumstances.

### ILLUSTRATION. MORISON *v.* LONDON COUNTY AND WESTMINSTER BANK[1]

The fraudulent clerk's (Abbot) dealings with his employer's cheques extended from May, 1907, to November, 1911, during which some fifty cheques which he paid into his own account had been collected. The defendants contended that if they were liable on the earliest cheques, the fact that the plaintiff's bank had paid the cheques during 1907 and 1908 without challenge from the plaintiff made any inquiry as to the later cheques unnecessary.

*Held:* That this contention was correct. Lord Reading, L.C.J., stated: "I cannot think that the defendants were guilty of negligence in not making inquiries in reference to these cheques after their experience of Abbot's transactions in the preceding two years,"[2] and Buckley, L.J., "the position after the end of 1907 was such that any suspicion which they ought to have had would have been lulled to sleep by the action of Morison himself.[3]"

[1] [1914] 3 K.B. 356. The facts of the case have been briefly given at p. 127, *ante*.

[2] *Ibid.*, at p. 369.

[3] *Ibid.*, at p. 377.

This theory of "lulling to sleep" is however not without its difficulties, since if the banker was already asleep during the earlier period it is really more a case of failure to awaken him than of lulling him to sleep. It has not received much favour in later cases.[1]

Scope of Sect. 82

The extension of the application of the crossed cheque sections of the Bills of Exchange Act, 1882, in the case of dividend warrants and of instruments falling within Sect. 17 of the Revenue Act has already been discussed.[2] In the case of open cheques, ordinary bills of exchange, promissory notes, and all other instruments not covered by these provisions, whether negotiable or not, the banker stands or falls by his customer's title and is liable in conversion if the customer proves to have no title.

## DISCOUNTER OR AGENT?

Question whether holder or agent

It is now necessary to return to the distinction between the banker collecting as holder for value and collecting as agent for his customer. As holder for value the banker is, as has already appeared, in the position of any other such holder of a negotiable instrument.[3] He may, if he satisfies Sect. 29 of the Bills of Exchange Act, 1882, take a title free of equities, but he cannot hold under a forged endorsement. The collecting agent on the other hand does not obtain the advantages of a holder in due course and if his customer's title is defective may become liable for conversion. In cases of crossed cheques, however, he can seek the protection of Sect. 82, which is particularly valuable in case of forgery. It is therefore of great importance to be able to tell in given circumstances in which capacity a banker has been acting. It has been laid down in a

[1] Cf. *Bank of Montreal v. Dominion Gresham Guarantee Co.*, [1930] A.C. 659, where the defendant's bank issued drafts on the fraudulent representations of the plaintiff's accountant. They did this over a period of some years without challenge, but the Privy Council refused to hold that they had been lulled to sleep. This is not, of course, a case under s. 82, and see page 122, *ante*.

[2] See p. 119 *ante* and p. 152 *post*.

[3] See p. 115, *ante*.

number of cases that this is entirely a question of fact.[1] It is a question of fact which has given rise to one very important controversy in which the matter was treated almost as one of law, viz. the dispute associated with *Capital and Counties Bank* v. *Gordon*.[2] It had long been the usual practice of the banks to credit all cheques and bills paid in for collection to the customer's account as soon as received and, in the event of failure to obtain payment, to make a debit entry for the same amount. During the intervening period, the customer would normally be allowed to draw on his account just as if payment of the instruments in question had actually been received: in other words the amount of the cheques was advanced to the customer. This procedure has very much the appearance of the bank acting as holder for value rather than as agent, and an opinion to this effect was expressed as early as 1891 by Bowen, L.J., in *National Bank* v. *Silke*,[3] "if a cheque is paid to a bank on the footing that the amount may at once be drawn upon, and it is drawn upon accordingly, the bank is a holder for value in due course."

The question may be said to have come to a head in the *Gordon Case*.[4]

### ILLUSTRATION. CAPITAL AND COUNTIES BANK *v.* GORDON[5]

Gordon was holder for value of various crossed cheques payable to his order. His clerk, Jones, forged endorsements to these in Gordon's name and paid them into his (Jones') account with the Capital and Counties Bank. His account was at once credited with the amounts of such cheques as cash, and he was permitted to draw upon the amounts so credited. The cheques were afterwards collected. The frauds were discovered, and Gordon sued for the recovery of the money.

*Held:* The defendants had not received payment for Jones, but for themselves, and could not rely on Sect. 82.

[1] *McLean* v. *Clydesdale Banking Co.* (1883), 9 App. Cas. 95; *Re Farrow's Bank*, [1923] 1 Ch. 41.
[2] [1903] A.C. 240.
[3] (1891), 1 Q.B. 435 at 439.
[4] *Infra.*
[5] [1903] A.C. 240.

It is difficult to resist the view that in deciding this case the House of Lords intended to lay it down that if the value of cheques is credited to the account before clearance, the inference must be drawn that the banker is acting as holder for value[1] and not as agent, unless indeed there be evidence to the contrary such as might be provided by an express agreement between two parties, but this could hardly be regarded as practical business. This inference was in fact drawn by the House of Lords from nothing more than the fact that the amounts in question had been credited, and the customer had been allowed to draw upon them, before clearance; there was no shadow of an express agreement giving him this right. There are nevertheless statements in later cases by judges of lower Courts which suggest that before the banker can be treated as a holder for value, there must be evidence of a "binding agreement" that the customer is entitled to draw on the amount credited in advance of collection, and that the mere fact that he has in practice been so credited and allowed to draw is not sufficient evidence.[2] It does not seem to the writer possible to reconcile this point of view with the opinions declared in the *Gordon Case* particularly by Lord Macnaghten. Whether or not this question is to be regarded as only of academic interest depends on the view to be taken of an important statute to which reference must now be made. The decision of the House of Lords was regarded

[1] See especially *per* Lord Macnaghten, "It is well settled that if a banker before collection credits a customer with the face value for cheques paid into his account, the banker becomes holder for value of the cheques."

[2] *Re Farrow's Bank*, [1923] 1 Ch. 41. See especially *Underwood, Ltd.* v. *Barclays Bank*, [1924] 2 K.B. 775, *per* Scrutton and Atkin, L.JJ.—the latter at p. 805 says "the mere fact that the bank in their books enter the value of the cheques for collection does not, without more, constitute the bank a holder for value." Of which statement we can only respectfully say that while it is clearly common sense, it appears equally clearly to be flatly contradictory to the opinion of Lord Macnaghten quoted above. The opinion of Lord Birkenhead in *Sutters* v. *Briggs*, [1922] 1 A.C. 1, noticed at p. 116, *ante*, may also be referred to. See for the contrary opinion the Gilbart Lecture for 1934, *Journal of the Institute of Bankers*, Vol. 55, pp. 193–9, where the *Gordon Case* is regarded as limited to its facts. If this be so the Act of 1906 was passed under a misapprehension.

as sufficiently serious to call for legislation, viz. the Crossed Cheques Act of 1906. This statute is a very interesting example of legislation passed with the object of remedying what was felt to be a judicial mistake.

## THE CROSSED CHEQUES ACT, 1906

The Bills of Exchange (Crossed Cheques) Act, 1906,[1] to give it its full title, enacts by Sect. 1, its operative section, that: "a banker receives payment of a crossed cheque for a customer within the meaning of Sect. 82 of the Bills of Exchange Act, 1882, notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof."

This section, thought at the time to be so important, has never received more than incidental consideration by the Courts and its meaning has for the most part been taken for granted by writers on the subject. It is open to serious question, however, whether the objective which the promoters probably had in view, viz. to destroy the effect of the *Gordon Case*, was achieved. The most obvious, if a somewhat narrow interpretation of the section, appears to be that the mere fact of the customer's account being credited before collection is not to be regarded as evidence that the banker is a holder for value of the cheque in question. But if other evidence is forthcoming from which the necessary inference can or should be drawn, there is nothing in the section which forbids its use. Now it is clear that in the *Gordon Case* great importance was attached to the fact that the customer had in practice been allowed to draw upon the amount so credited. As controversy is unlikely to arise except in cases where the customer has been allowed to draw, it would appear that on this interpretation bankers would seldom be able to derive protection from this statute. It may be contended that since a customer is *prima facie* always entitled to draw upon the account to the extent that it is in credit, the fact that he does so does not really carry the matter any further, and

[1] 5 & 6 Edw. VII, c. 17.

that the words of the section are therefore wide enough. In the absence of a decision, it is not possible to say what is the true position.[1]

## DUTIES OF COLLECTING BANKER

Duty to customer

Like any other agent a collecting banker is under the duty of carrying out his task with reasonable skill and diligence, and taking all the steps needful for the safeguarding of his principal's interests. Due diligence is important in most operations connected with bills and notes because rights are easily lost by delay, e.g. against endorsers. The rules as to presentment for acceptance are contained in Sects. 39–40 of the Bills of Exchange Act, 1882, and for payment in Sect. 45, the details of which need not be set out here. Normally only bills payable after sight need be presented for acceptance, but failure to present when necessary discharges the drawer and endorsers.[2] The principal difficulties as to time of presentment for payment arise in connection with instruments payable on demand, and as to this there appears to be no material difference between an ordinary bill and a cheque.[3] In each case presentment must be made within a reasonable time of the issue, and the question of what is a reasonable time in the circumstances depends on the "nature of the instrument, the usage of trade and of bankers, and the facts of the particular case."[4] According to Chalmers, this section introduces a new and less rigorous measure of reasonable time than that existing at Common Law.[5] It is conceived, however, that the Common Law rules indicate what will normally be regarded as reasonable. They are stated in detail by Chalmers,[6] and may be summarised as follows—

Presentment

[1] In Hart's view, *op. cit.*, p. 635, the banker is covered by the Act, notwithstanding he has become a holder for value, provided "he is in reality . . . acting as a collecting banker." But surely this begs the question.

[2] Bills of Exchange Act, 1882, s. 40 (2).

[3] As to cheques, see Bills of Exchange Act, s. 74 (2).

[4] *Ibid.*

[5] *Op. cit.*, p. 293.

[6] *Op. cit.*, p. 293–4.

(1) Where the person receiving the cheque and the paying banker are in the same town, the cheque must be presented on the day after its receipt.

(2) When the person receiving the cheque and the paying banker are in different towns, the cheque must be forwarded to the agent who is to collect it on the day after it is received so that it may be presented (or where necessary reforwarded) on the day after receipt.

It appears from these rules that action whether of presentment or forwarding must normally be taken on the day after the instrument is received, and this would be so whether it is an ordinary bill of exchange or a cheque. If the payee or holder, however, instead of taking the necessary steps himself, employs his banker to take them for him, the question arises as to whether he is entitled to an extra day. This has not been decided, but it does not greatly concern the banker provided he has himself taken action on the day after the receipt of the instrument. Normally presentment is effected through the Clearing House and the times for the different clearings taking place at that institution are arranged so as to suit the convenience of banks and their branches doing business at a distance from the City of London. The custom is for the collecting bank to send the cheques to the Clearing House on the same day as it receives them, and subject to the provisions of the Act just cited this would appear to be its duty. Presentment may, however, be made direct, as for example by post.[1] Failure by a collecting banker to present at the proper time will make him liable for any loss sustained by the customer thereby. This might happen in one or other of these ways—

(*a*) The acceptor of the bill or the drawer of the cheque might become insolvent and the instrument be dishonoured. If it then appears that it would have been paid if presented at the proper time, the banker will be liable.

[1] S. 45 (8) and *Prideaux* v. *Criddle* (1869), L.R. 4 Q.B. 455, at p. 461.

(*b*) The acceptor or drawer may be insolvent all the time but the banker's failure to present may have discharged endorsers (and, in the case of a bill of exchange, the drawer) from their obligations.

(*c*) In the case of a cheque, the drawer's bank may become insolvent during the interval, whereupon the drawer suffers damage in that his balance is no longer fully available to meet the cheque. The holder will lose to this extent,[1] and be entitled to recover the difference from his banker.

Notice of dishonour

If on presentment the instrument is dishonoured, notice of dishonour must be given to the parties secondarily liable, i.e. endorsers and the drawer in case of an ordinary bill of exchange, otherwise they will be discharged,[2] and the banker who has failed to give the necessary notice either to other parties or to his principal[3] will become liable to his customer for any loss sustained thereby. The rules as to giving notice of dishonour are given in Sect. 49 of the Bills of Exchange Act and it is unnecessary to repeat them here. Subsect. 13, however, which deals expressly with the position of agents, must be noticed. It gives the agent in whose hands the bill has been dishonoured the option of either himself giving notice of dishonour or of giving notice of what has happened to his principal, who must thereupon give the necessary notices himself, and is granted additional time in which to do so. From the point of view of the agent the latter is obviously the easiest and safest course, for as a rule he will not know the addresses of the endorsers, and is excused compliance with the rules of Sect. 49 except in so far as they can be considered to apply to the notice given by the agent to his principal. The practice is to return the dishonoured cheque to the customer,[4] and this would appear to be ample notice to enable him to act.

[1] See Bills of Exchange Act, s. 74 (1).
[2] See *ibid.*, s. 48.
[3] See below.
[4] Cf. s. 49 (6), but it may be doubted whether this subsection was intended to apply to such a case, as Paget points out it does not cover all the possibilities. See *op. cit.*, p. 292.

Responsibility of sub-agent

If the collecting banker has to employ a correspondent or sub-agent to act for him, he is responsible to the customer for any neglects or defaults on his part. But it is doubtful if there is any duty in the absence of an account. Moreover, the receipt of the money by the correspondent is the equivalent of receipt by his principal, and if he become insolvent before he has paid it over the principal remains liable to his customer.

**ILLUSTRATION. MACKERSY *v.* RAMSAYS**[1]

The plaintiff had an account with the defendants, bankers, and sent them a bill of exchange for £100 drawn on one, Clelland, in Calcutta. The defendants sent this bill to Coutts & Co. for them to send it to their Calcutta correspondents, which was done, and the instrument duly presented and the amount received. The correspondents then failed, with the result that the defendants never got the money, and refused to credit it to the plaintiff's account.

*Held:* The defendants were liable. Since the money had been received by their agents, it must be taken to have been received by them.

Position when discounting

If the banker discounts the instrument and becomes holder for value, he must in practice equally carry out the formalities of presentment and of giving notice of dishonour, but in case of failure the loss, if [illegible], will be upon his own head.

[1] (1843) 9 Cl. & F. 818.

# CHAPTER VII

## OTHER INSTRUMENTS USED IN BANKING

It is proposed in this chapter to discuss the legal position of bankers in relation to a number of negotiable and similar instruments with which they have to deal in the course of business.

### BILLS OF EXCHANGE

Bankers may become interested in bills (and in others of the instruments discussed in this chapter) in a variety of ways but principally—

(A) As holders of bills which they discount for customers or others.

(B) In connection with bills entrusted to them for collection by customers.

The position under these two heads is exactly the same as in connection with cheques and the distinction has already been discussed.

(C) As their customers' agents to pay bills domiciled, i.e. accepted payable, at the bank.

It is not considered part of the general duty of a banker to pay such bills even if the customer's account is in credit unless he has agreed to do so; but a course of business may exist which places him under the obligation. The making of a bill payable at the bank is the equivalent of an instruction to pay it, and the banker may therefore, if he chooses, make payment and debit the customer's account with the amount.

In paying such bills, the bank is under the same duty to take care as in the case of cheques. The overdue bill would appear to be the equivalent of a stale cheque, and it is generally considered that while the banker is entitled to pay up to the six years period of limitation,

subject, of course, to the authority not having been terminated, he should as a matter of practice first obtain the customer's authorisation.[1]

Forgeries

The real difficulty, however, arises from forgery. The forgery of the customer's acceptance gives rise to exactly the same position as a forgery of his signature to a cheque. The bank must recognise this signature at its peril; similarly with other material alterations, such as that of the amount of the sum payable. A question may arise as to whether the customer is under any duty to the bank to exercise care that the instrument is not in such a state that it can easily be altered before presentation for payment, i.e. as to whether the *McMillan Case* applies to payment by a bank of a domiciled bill. This decision does not apply to acceptances,[2] but this does not assist in the elucidation of the position of the bank. The answer to the question is not easy, because, of course the acceptor, unlike the drawer of a cheque, is not responsible for the original drawing of the instrument. The drawee, however, need not accept any instrument which exposes him to danger, and if he is relying upon his bank to pay, it is submitted that he must either advise them of the amount (the normal course) or see that they are not endangered by the form of the instrument.[3] The bank on making payment are acting as their customer's agent and would appear to be entitled to protection and indemnity from their customer.

The main danger to the bank lies in the possibility of the holder having no title, owing to the forgery of one of the endorsements upon which that title depends. In such a case there is no authority to pay such a person and the bank cannot debit their customer with the amount.

[1] *Questions on Banking Practice*, 9th Ed., p. 69, Q. 211.
[2] *Scholfield* v. *Londesborough*, [1896] A.C. 514.
[3] Lord Halsbury in *Bank of England* v. *Vagliano*, [1891] A.C. 107, at p. 114, says "a principal who has misled his agent into doing something on his behalf which the agent has honestly done would not be entitled to claim against the agent in respect of the act so done."

**ILLUSTRATION. ROBARTS v. TUCKER**[1]

No protection similar to that in connection with payment of cheques is conferred upon bankers paying domiciled bills either by the Bills of Exchange Act or any other statute. There are two cases however, where the banker may escape liability—

When banker not liable

(i) When the forged endorsement can be disregarded because the payee was fictitious or non-existing and the bill can therefore be treated as payable to bearer.[2] The famous case *Bank of England* v. *Vagliano*[3] is an example of this exceptional case.

**ILLUSTRATION. BANK OF ENGLAND v. VAGLIANO**[4]

The plaintiff, Vagliano, had in his employment a clerk who forged a bill of exchange, making one, Vucina, the drawer; his employer, the plaintiff, the drawee; and Petrides & Co., the payees. Both Vucina and Petrides & Co. were persons with whom the plaintiff had business relations, and he accepted the instrument payable at his bankers when it was put before him by the fraudulent clerk. The latter then forged an endorsement in the name of Petrides & Co., and presented the instrument and obtained payment from the defendant bank who debited the plaintiff's account with the amount

*Held:* The payee was fictitious; the bill was payable to bearer; the endorsement could be disregarded; and the account was properly debited.

(ii) When the customer is estopped from denying the authenticity of the endorsement. This is likely to be even rarer in practice than the other case.

**ILLUSTRATION. BANK OF ENGLAND v. VAGLIANO**[1]

The instrument placed before Vagliano by the clerk for acceptance was a forgery throughout. By accepting it payable at his bank, however, Vagliano represented it to be genuine. On the faith of that representation, the Bank paid it. Vagliano was therefore estopped from denying its authority.

Per Lord Selborne, at p. 124: "I think that a representation made directly to the banker by the customer

[1] (1851) 16 Q. B. 560. See Chapter V, p. 86, *ante*, where the facts are digested.
[2] Bills of Exchange Act, 1882, s. 7 (3)
[3] [1891] A.C. 107.

upon a material point, untrue in fact (though believed by the person who made it to be true) and on which the banker acted by paying money which he would not otherwise have paid ought also to be an answer. If the bank acted upon such a representation in good faith and according to the ordinary course of business, and a loss has in consequence occurred which would not have happened if the representation had been true, I think that is a loss which the customer and not the bank ought to bear."

**Liability to third parties**

When the payment of a bill by the bank is improper owing to forged endorsement, the instrument must be treated as if it had never been paid, and the true owner on recovering it will be entitled to payment, so the bank on behalf of their customer, the acceptor, will have to pay again. Alternatively, the true owner could claim that there had been a conversion by the bank of his property in the instrument. On the other hand, the bank may be entitled to recover the money paid away in the first instance from the holder to whom they made payment, on the ground that it was paid under a mistake of fact. There are two possible cases—

(i) That the person who received the money was himself guilty of the fraud, or at any rate did not hold *bona fide*, or under a reasonable claim of right. From such a person the paying bank may recover.[1]

**ILLUSTRATION. KENDAL *v.* WOOD**[1]

The plaintiff's partner induced the defendant with whom the firm had dealings to apply £1000 of the partnership money which was in the defendant's hands to the liquidation of a private debt. Upon the dissolution of the partnership there appeared to be owing to the defendant from the partnership £5000, and the plaintiff accepted the defendant's bills for this amount, and afterwards paid them. Having discovered the facts as to the £1000, he claimed that this should have been deducted, and that he was entitled to recover such sum.

*Held:* The bills had been accepted and paid in mistake of fact, and the amount was therefore recoverable.

(ii) The receiver of the money may have acted *bona*

[1] (1871), L.R. 6 Ex. 243; cf. also *Martin* v. *Morgan* (1819), 3 Moore, C.P. 635.

*fide* and innocently. From such a person the paying bank can also recover, but only provided his position *vis-à-vis* other parties to the bill has not in the meantime been prejudiced by the delay in discovering and notifying him of the mistake, or (it seems) if there has been undue delay in correcting the mistake.[1]

**ILLUSTRATION. IMPERIAL BANK OF CANADA *v.* BANK OF HAMILTON**[2]

The Bank of Hamilton had paid to the Bank of Canada the amount of a fraudulently raised cheque, and in these proceedings sued to recover the amount as having been paid in mistake of fact. The forgery had been discovered, and the demand for repayment made the day after payment. The demand was refused on the ground (*inter alia*) that it should have been made not later than the day when payment was made.

*Held:* That the plaintiffs were entitled to recover. The requirement that demand for repayment should be made at once applies only to instruments, like bills of exchange, where there are parties entitled to notice of dishonour.

It is particularly important that the holder of a bill should know exactly what his position is at the time when he presents for payment since his rights against previous parties may crystallise at that time, and if he receives payment when it should have been refused he may be deprived of the opportunity of suing some party whose endorsement is subsequent to the forgery and who becomes insolvent before the mistake is discovered.

It is suggested by Chalmers that it is also a condition of the bank's right to recover in the latter case that there should have been no negligence in the payment.[3] There does not appear to be authority for this proposition, which must be considered doubtful. The cases cited by Chalmers do not substantiate his proposition.

Bills may come into the possession of the bank by **Pledge or lien**

[1] *London and River Plate Bank* v. *Bank of Liverpool*, [1896] 1 Q.B. 7. This case has been criticised—the period between payment and discovery of forgery was six weeks, and the acceptor failed to recover his money.

[2] [1903] A.C. 49. There does not appear to be any reported case of recovery of money paid on a forged endorsement.

[3] *Op. cit.*, p. 242.

way of pledge or lien, a topic which can best be studied in connection with securities for advances.[1]

## PROMISSORY NOTES

These instruments may be dealt with by banks in exactly the same way as bills, viz. by discount, collection, payment of domiciled notes, or security. Part IV of the Bills of Exchange Act, 1882, which relates specifically to notes must, of course, be borne in mind. A note made payable in a particular place must be presented for payment at that place in order to render the maker liable,[2] while an acceptance of a bill to pay at a particular place is a general acceptance unless it expressly states that the bill is to be paid there only and not elsewhere.[3]

## CONDITIONAL ORDERS ON BANKERS

See Chapter IV, page 33, *ante*.

## DIVIDEND WARRANTS

The term "dividend" is usually used to denote the sum payable by a trading company to one of its members as his share of the profits. As soon as declared, the dividend becomes a debt due from the company to the shareholder. Such debts are usually paid by a warrant or order on the company's bank.

This dividend-warrant is often drawn in the form of a cheque and, if so, the considerations already discussed in detail in connection with cheques apply, if not "it must stand on its own footing"—as Paget says.[4] Special usages relating to dividend warrants and the endorsement thereof are expressly preserved.[5] This might justify a divergence in the law between cheques and dividend warrants, but so far as the writer is aware no such divergence exists except in one case, viz. that there appears to be a practice to pay a dividend warrant drawn payable to the order of two or

See Chapter XI, *post*.
Bills of Exchange Act, 1882, s. 87 (1).
*Ibid.*, s. 19 (2) (*c*).
*Op. cit.*, 136.
Bills of Exchange Act, 1882, s. 97 (3) (*d*).

more persons on the endorsement of any one of them.[1]

Should, however, the order in a dividend warrant be qualified by a requirement that the payee shall sign a receipt form appearing on the warrant or by some other condition of the type discussed in the chapter on cheques,[2] such an instrument, as is there pointed out, may fail to qualify as a bill of exchange and the provisions of the Act will not apply except in so far as they are the law by mercantile custom as opposed to statute.[3] The legal position of the banker in his handling of such instruments is far from clear. *Prima facie* it is less satisfactory than that which exists in the case of cheques, since the special protections which we have already discussed under "Cheques" exist only by virtue of the statute. To a limited extent, however, the statutory protections may apply to dividend warrants,[4] though the dangers attending their use are perhaps not sufficiently great to cause the banks to insist on the use of modified forms of cheques for payments of these warrants.

The position may be safeguarded in the following ways—

(i) By crossing the instruments, as is commonly done. In such cases the sections of the Bills of Exchange Act relating to crossed cheques are expressly applied to them by Sect. 95 of that Act. It is to the advantage of everybody concerned that these instruments should be crossed, since paying bank, collecting bank, and drawer thereby obtain the valuable privileges already discussed. Sect. 60 relating to forged endorsement will not apply to protect paying banks but as we have seen the provisions of Sect. 80 appear to give an equally wide protection in the case of crossed cheques, and therefore of crossed dividend warrants.[5]

As to existence of this see Paget, *op. cit.*, p. 137.
See Chapter IV, p. 38, *ante*.
S. 97 (3) (*d*). A contrary view (see Chalmers, *op. cit.*, p. 382) ms to be unfounded.
*Goodwin* v. *Robarts* (1875), L.R. 10 Ex. 337, at p. 354.
See Chapter V, p. 85, *ante*.

(ii) The crossing may be supplemented by the words "not negotiable" or "a/c payee" with the same result it is submitted as in the case of cheques. This statement, however, begs the question whether a dividend warrant not in the form of a cheque is in fact negotiable. If it is not negotiable, there is no need so to mark it since the transferee could clearly obtain no better title than his transferor. In an early case *Partridge* v. *Bank of England*,[1] it was held that a dividend warrant payable neither to order nor to bearer could not be negotiable by custom on the ground that it was not negotiable on its face. This reasoning was expressly overruled by the Bills of Exchange Act, 1882, in cases of bills and notes,[2] and it is doubtful if it would now be accepted, especially in view of *Goodwin* v. *Robarts*.[3] Even so, however, the decision turns upon the absence of the words "or order" and not upon any intrinsic lack of negotiability in dividend warrants. In *Gordon* v. *London City and Midland Bank*,[4] Collins, M.R., expressed the view that instruments in this form are not negotiable. But the question was not really argued. These instruments are often treated as negotiable, and there is eminent opinion in favour of the view that they are in fact negotiable instruments, unless drawn in such a form as to prevent negotiability attaching.[5]

**Holders** (iii) If we are right in considering such warrants to be negotiable, the position of banks as holders of these instruments is the same as in cases of any other negotiable security. They should, however, consider the form in which the instrument is drawn carefully in case it contains expressions restricting negotiability. As to collection, the position here appears exactly the same as in the case of cheques. If the instrument is crossed, Sect. 82 gives protection in the event of the customer having no title: if uncrossed there will be liability in conversion. There may, however, be a question

(1846), 9 Q.B. 396.
S. 8 (4) of the Bills of Exchange Act, 1882.
(1875) L.R. 10 Ex. 337 at p. 354.
[1902] 1 K.B. 242.
Paget, *op. cit.*, p. 139.

whether the Bills of Exchange (Crossed Cheques) Act, 1906, applies to dividend warrants, as it mentions crossed cheques only. It is submitted that by reason of Sect. 95 of the 1882 Act the expression "crossed cheques" includes dividend warrants. Since dividend warrants and interest warrants (see below) are usually sent out at regular intervals to the payees, it may be a convenience to the latter that they should be sent directly to the customer's bank for collection. The banks are willing to, and often do, perform this additional service. It entails, however, that the bank should give necessary discharge of the instruments and this requires a formal authorisation by the customer. Certificates of payment of income tax on the sum paid by means of the warrant are commonly attached thereto and these are detached and forwarded to the customer with his pass book and statement of account. The payment of dividend warrants or taking them as a security does not call for any special treatment.

## INTEREST WARRANTS

**Interest warrants**

Interest on government and municipal stocks and on the debentures which are often issued by limited companies is usually paid by means of warrants which are similar in form to dividend warrants. Interest which is payable, usually at a fixed rate, on borrowed money is legally entirely different from dividends which are money earned by capital employed at risk in business. The distinction is commonly ignored by non-lawyers and interest warrants are often referred to as dividend warrants, e.g. the warrants issued by the Bank of England in respect of war loan were headed "Dividend Warrants." This gives rise to at least two difficulties. The first is as to whether Sects. 95 and 97 (*d*) of the Bills of Exchange Act apply to such warrants. With one important and doubtful exception, it is suggested that they cannot do so, on the ground that the proper legal construction must be given to the word "interest." In connection with interest on the National Debt, however, the faulty use of words

"dividend warrant" when "interest warrant" is meant appears to be justified by the National Debt (Conversion) Act, 1888, Sect. 30 (5), and the subsections referred to have therefore been held to apply to warrants issued for payment of war loan.[1] The matter is perhaps not of great importance since even if the crossed cheque sections of the Act are not applied to such warrants by Sect. 95 they are applied by Sect. 17 of the Revenue Act, 1883, which extends them "to any document issued by a customer of any banker, and intended to enable any person or body corporate to obtain payment from such banker of the sum mentioned in such document, and shall so extend in like manner as if such document were a cheque."

Application of Sect. 97 (3) (*d*)

The question whether Sect. 97 (3) (*d*) which preserves usages relating to dividend warrants applies to interest warrants is perhaps more important. The usual form of interest warrant is a cheque and therefore if, as is submitted, the term "dividend warrant" does not, generally speaking, include interest warrants, endorsements to be in order require to be made as in the case of cheques. The usage already noticed as existing in the case of dividend warrants[2] in case of interest warrants which are in fact cheques would appear to offend against the requirements of the Act.[3] If, as is common in the case of trusts, warrants payable to several payees are being handled, an authority should be lodged with the collecting bank to collect on the signature of one of the payees, but even so care must be taken not to credit the proceeds to his private account, as the protection of Sect. 82 might thereby be lost.

## BANKERS' DRAFTS

A banker's draft is a draft drawn by a branch on the head office or on another branch. It is not a cheque,[4]

[1] *Slingsby* v. *Westminster Bank*, [1931] 1 K.B. 173.

[2] See above p. 84.

[3] S. 32 (3) which requires that if there are two or more payees all must endorse unless the one endorsing has authority to endorse for the others.

[4] See Chapter IV, p. 41, *ante*.

but since these instruments are commonly crossed and as the crossed cheques sections of the Bills of Exchange Act now apply, they do not require special discussion,[1] save on one point, which has already been dealt with, viz. whether a foreign draft is covered by Sect. 19 of the Stamp Act, 1853.[2]

## BEARER DEBENTURE BONDS AND COUPONS

Certain types of borrower for the convenience of their lenders undertake to repay the loan either to the lender or to anybody whom he may designate. This is usually most easily effected by issuing to the lender a bond specifying the amount of the loan and interest payable thereon and containing an undertaking by the borrower to make repayment to the bearer of the bond: the bonds being issued for sums in round figures. This type of security, known as a bearer debenture bond, has the great advantage of enabling transfer to be made without any formal execution of assignment, or entering in registers. Being in negotiable form such bonds have for many years been treated in the English market as negotiable instruments, a custom recognised by the Courts in the case of foreign bearer bonds in 1875,[3] and English bearer bonds in 1898.[4] Industrial securities are frequently now issued in the same form, particularly where holdings are international in character as in several of the big oil companies. Such instruments must naturally be negotiable on their face, for business usage cannot confer negotiability. Bankers are principally concerned with this type of instrument as security for loans.[5] The ordinary method of paying interest or dividends by warrant cannot be employed in this type of case; the owner for the time being, i.e. the bearer of the security, must

[1] See above, pp. 99, *et seq.*, *ante*.
[2] See Chapter V, p. 88, *ante*.
[3] *Goodwin* v. *Robarts* (1875), L.R. 10 Ex. 337.
[4] *Bechuanaland Exploration Co.* v. *London Trading Bank*, [1898] 2 Q.B. 658; *Edelstein* v. *Schuler*, [1902] 2 K.B. 144.
[5] See Chapter XI.

be left to claim his money. *Prima facie*, this means proving his interest by production of the bond on each occasion. Frequent handling of a bearer instrument is risky, and machinery has therefore been provided in the form of sheets of coupons attached to each bond or debenture. The latter are issued with serial numbers so that each coupon on a sheet will bear the serial number and in addition will have its own number indicating the order in which it is to be presented for payment, e.g. No. 9304 Coupon 6. When the time comes for payment of Coupon 6, it is detached from the sheet and presented for payment. These coupons are freely transferred after becoming due for payment and it may be that they are negotiable, though there is no decision on this point. Banks frequently undertake the service of collecting these coupons for their customers.[1] They can also hold them by way of security and would appear to be quite safe in buying them as soon as they are due for payment provided the relative bond or debenture is produced at the time. They are not likely to do so very much in practice.

## ORDERS BY LOCAL AUTHORITIES

Local authorities such as city or district councils[2] are not permitted to have bank accounts, but do their financial business through treasurers. The treasurer, who may or may not be a bank official, has an account at a bank out of which the local authority in fact makes payment. Payments are made by means of orders on the treasurer. When the treasurer is a bank official, or if he is an honorary officer, the order is drawn upon him and made payable at the bank where the account is kept. It is drawn in the form of a cheque but generally has a receipt form attached which must be signed and be of the type already discussed.[3] This instrument is then presented by the payee or holder at the bank

[1] See p. 114, *ante*.
[2] As we shall see, pp. 192, *et seq.*, *post*.
[3] See p. 38, *ante*.

on which it is drawn and paid in the ordinary way, or collected on his behalf by his own bank. When the authority has a paid treasurer, the practice appears to be for the proper officer within the council to issue an instruction to the treasurer to pay £X to CD, the payee. The treasurer thereupon issues his own mandate to the bank to pay the amount; this also being in the form of a cheque, but with the usual receipt clause.

The former type of instrument does not, even if there be no difficulty about a receipt clause, fall within the definition of a cheque since it is not drawn on a banker: nor is it within Sect. 19 of the Stamp Act, 1853—it is in some respects like a domiciled bill. It is clearly a bill of exchange and therefore negotiable. If it is not a cheque, neither Sect. 60 nor the crossed cheque sections of the Bills of Exchange Act can apply to it. As we shall see, however, when discussing this type of account, the Courts have tended to look at the reality of the situation and find on the facts that the account was the account of the local authority. In such a case, it has been held that the bank paying such an order on a forged endorsement are entitled to plead Sect. 60.[1] Are they cheques?

The question whether such an instrument can be effectively crossed depends on the considerations discussed already, viz. as to whether instruments can be crossed otherwise than under the Statutes.[2] Crossings

Secondly, is the order intended to enable a person to obtain payment from a banker? Again, technically the payee is to obtain payment from the treasurer though actually from the banker. Practice

Technically speaking, these matters may be regarded as of little importance to paying bankers. The treasurer, not the bank, pays the holder of the order and does so by his own cheque on the bank, which will be in order. Actually, however, since the nomination by

[1] See Chapter IX, pp. 193, *et seq.*, *post*, and *Halifax Union* v. *Wheelwright* illustrated there.

[2] See p. 54, and *Guardians of St. John, Hampstead* v. *Barclays Bank* (1923), 39 T.L.R. 229, for an example of such a crossing being assumed to be in order.

the bank of one of their servants to be treasurer is simply a method of obtaining the authority's account, the treasurer's position, if he pays on a forged endorsement, is of importance since his employers will presumably shoulder his responsibility. There appears to be no statutory protection for the treasurer in such a case, but the decisions referred to already indicate that the Courts usually look at the substance of the transaction, and place responsibility on the banker. *Vis-à-vis* the true owner of an instrument of this type which has been stolen, and cashed with the treasurer under a forged endorsement, the treasurer would appear to be liable in conversion. Where the account is held to be in fact that of the treasurer,[1] the instrument certainly cannot be treated as a cheque, and cannot come within either Sect. 19 of the Stamp Act, 1853, not being drawn upon a banker, nor within Sect. 17 of the Revenue Act, 1883, not being issued by a customer of a banker. The banker who pays such an instrument to a person not entitled appears to be in the same position as when he pays a domiciled bill upon a forged endorsement,[2] i.e. he could not debit the treasurer, nor could the treasurer as servant of the authority properly agree to accept the debit. The payee named, or other true owner of the instrument, would have an action against the banker for conversion.[3]

A collecting banker, however, would not appear to be protected in the event of endorsements being forged, unless Sect. 17 of the Revenue Act, 1883, applies, and then only in the event of the instrument having been crossed.

With the increased business of the local authorities and their growing size, the practice of appointing a bank officer as treasurer seems to be giving way to that of appointing whole-time official treasurers. This will have an important effect in regularising an anomalous position.

[1] Cf. *Cosford Union* v. *Grimwade* (1892), 8 T.L.R. 775.
[2] See above, p. 85.
[3] But see Paget to the contrary, *op. cit.*, p. 143.

## MONEY ORDERS AND POSTAL ORDERS

These are orders drawn on the Postmaster-General or on the Postmaster at a particular branch post office, ordering the payment of a specified sum of money to the person indicated therein: the former being used for higher denominations, the latter only for sums up to twenty-one shillings. They are issued under the provisions of the Post Office Act, 1908, and are not negotiable. The difficulties which are found in connection with these instruments from the point of view of banking arise almost entirely from collection. They are frequently collected for their customers by banks and when they are crossed, as is often the case, can only be collected through a bank. In this event the signature of the payee is not necessary, as the bank can sign for him. It is usual, however, to request the payee's signature, possibly with the object of avoiding conversion should the title prove defective, though it may be doubted whether this procedure would have the desired result. Being issued and paid by postal officials as such, they do not come within the Bills of Exchange Act, 1882, nor does Sect. 17 of the Revenue Act, 1883, bring them within the crossed cheque sections of that Act. The collecting bank had originally no statutory protection and was liable to the true owner if it cashed the order for somebody not entitled to it.

**ILLUSTRATION. FINE ART SOCIETY *v.* UNION BANK OF LONDON[1]**

The plaintiffs were customers of the defendants. Their secretary also had an account with the defendants. He received post office orders on his employer's behalf which it was his duty to pay into their account. Actually he paid them into his own account, and the defendants placed their stamp upon them and collected them for him.

*Held:* They had been guilty of conversion of the plaintiff's property and were liable.

This position was unfair seeing that an obligation to collect was in effect put on the banks. A degree of

[1] (1886), 17 Q.B.D. 705.

protection has been now afforded by Sect. 25 of the Post Office Act, 1908, under which—

"A banker collecting a postal order or document purporting to be a postal order for any principal shall not incur liability to anyone but that principal by reason of having received payment of or presented such order or document for payment."

The protection is not confined to cases of collection for customers. It will be observed that this section applies only to postal orders and not to money orders. With regard to these the banker is not protected. Moreover, by the Post Office regulations relating to money orders,[1] the Post Office have the right on discovering that a money order paid to a bank was irregular, to return it to the bank and deduct the amount from any moneys due or to become due to the bank.[2]

## LETTERS OF CREDIT, CIRCULAR NOTES AND TRAVELLERS' CHEQUES

The nature and operation of these instruments is explained later.[3] It is sufficient here to indicate how far they are negotiable.

The letter of credit is not by its nature negotiable or transferable. Drafts drawn under circular letters of credit are, however, bills of exchange.

Circular notes and travellers' cheques, which are practically synonymous terms, may be negotiable instruments if drawn in the form of cheques. Normally, however, they are drawn subject to a condition, such as the completion of a second signature or the production of a letter of indication,[4] and are not therefore negotiable.

[1] Money Order Amendment (No. 2) Regs. 1908, No. 118.

[2] *London and Provincial Bank* v. *Golding* (1918), *Journal of the Institute of Bankers*, Vol. 39, 136.

[3] Chapter X, p. 207.

[4] Cf. *Conflans Quarry Co.* v. *Parker* (1867), L.R. 3 C.P. 1.

## CHAPTER VIII

# THE ACCOUNT

It is obvious that in the normal course of events the number of cheques paid and collected by a banker for his customer may amount to a considerable number during a short period of time. It is necessary, therefore, from the point of view of each party that a careful account should be kept of all such items, and it is perhaps natural that the responsibility for this should rest primarily upon the banker. A number of important questions arise in banking law which can most conveniently be discussed in connection with the account, and will therefore be considered in this chapter.

Different kinds of account

In the first place, there are two main types of account, the current and the deposit, though variations in the form of current account are sometimes met with. These titles explain themselves—the current account is the one on which the customer draws his daily cheques and is normally operated continuously; the deposit account is in effect a saving account; at any rate for the time being, since the customer does not intend to make immediate use of money placed to deposit. In either case the relationship is that of debtor and creditor.

The curre account

In the absence of agreement, it is only on the current account that the customer is entitled to draw[1] cheques. Since the money is at call in this way, it is not the general practice for bankers to pay interest on the balance of a current account, though some bankers even in modern times have done so. This, however, is regarded as an unsound policy. In certain parts of the country however, notably in the north west, a traditional practice of paying interest on current accounts has been taken over by the branches of the big banks,

[1] Two exceptional cases where there is such agreement are noticed below under Deposit Account.

and if this be done an implied term that interest will be paid must be read into the contract, and the banker will not be entitled to discontinue payment thereof without notice. When there is both a current and a deposit account, it is an implied term of the contract between the parties that money paid in, cheques collected, etc., will be credited to the current account unless other instructions are expressly given. When overdrafts are allowed, they will be on the current account.

## THE DEPOSIT ACCOUNT

**Deposit accounts**

A deposit account normally differs from a current account in three particulars: (i) interest is payable on the balance; (ii) the loan is not repayable on demand, but only on a specified notice (deposits at call or repayable at the end of a fixed period, such as six months, are also met with); (iii) the loan is only repayable after the return of the deposit receipt or deposit book to the banker.[1]

**Interest**

(i) The rate of interest payable by the banker may be, and in the case of the deposit of a large amount not infrequently is, the subject of a special agreement. In the absence of this the rate is impliedly agreed at that usually paid by the bank, and in London this is normally 2 per cent under bank rate.[2]

**Notice**

(ii) In the usual kind of deposit account the banker stipulates for a short period notice of withdrawal, such as seven or fourteen days, but in practice repayment is often granted on demand. Substantial sums of money are often placed on deposit for a fixed period, in which case the banker's obligation is to repay at the end of that period. The question has been raised whether a deposit at call, i.e. repayable on demand, can be drawn on by cheque. The affirmative view expressed in *Hopkins* v. *Abbott*[3] by Malins, V.C., is challenged by Paget.[4]

[1] Deposit receipts are giving place to deposit books.
[2] This is of course the Bank of England's rate for discounting approved bills, which is published weekly.
[3] (1875), L.R. 19 Eq. 222.
[4] *Op. cit.*, p. 87.

A deposit receipt, or more usually, a deposit book, is handed to the customer at the time when he opens his deposit account. The receipt is in some such form as— Deposit receipt

........................... BANK, LTD.

Not transferable

*No*........................... *Date*...........................

£........*X*........

Received of..........*John Smith, Esq.*..........................the sum

of..................*X thousand pounds*..........................................

To be placed to Deposit Account subject to seven days notice of withdrawal. This receipt to be surrendered on withdrawal of the whole or any part of the sum deposited.

For the............................Bank Ltd.

..............................Manager.

..............................Cashier.

On the reverse side will be printed a form of receipt—

Received from........................................... Bank Ltd.

the sum of £*X*
Interest £*Y*

£(*X* + *Y*)

Stamp 2d. *John Smith.*

These deposit receipts are usually not negotiable or indeed not transferable on the face of them. Apart from this no usage to treat them as negotiable has ever become established.[1] The result of this is that a banker who pays money from a deposit account to some person other than the customer runs a grave risk, even when that person produces the deposit receipt bearing the customer's signature to the receipt form and is able

[1] See *Re Dillon, Duffin v. Duffin* (1890), 44 Ch.D. 76; *Pearce* v. *Creswick* (1843), 2 Hare 286; *Moore* v. *Ulster Bank* (1877), 11 I.C.L.R. 512. In the U.S.A. deposit receipts are issued payable to bearer, and have become negotiable by usage.

to give a reasonable explanation as to how he came to present it for payment.

**ILLUSTRATION. PEARCE *v.* CRESWICK**[1]

A customer of the S. & R. Bank had what was in effect a deposit account. In respect of this, the bank issued receipts which the customer returned once a year to be cancelled; new receipts being issued with last year's interest accrued. The customer died, and a stranger obtained the receipts, fraudulently endorsed them, and obtained payment of the sum due through the N. Bank to which the S. & R. Bank gave credit for the amount. The executor of the deceased sued the S. & R. Bank through C. their representative. The defence was that it was customary to pay these receipts when presented through another bank.

*Held:* The alleged custom could not justify the payment.

The payment to the wrong person cannot affect the banker's liability to his customer which remains the same as if no unauthorised payment had been made; unless indeed the customer is estopped from contending that he had not authorised the payment. It appears that something more than mere negligence by the customer is required to found an estoppel. Possibly extreme carelessness may eventually be held to do so.[2]

**ILLUSTRATION. EVANS *v.* NATIONAL PROVINCIAL BANK**[3]

The plaintiff had a deposit account with the defendants, and held a deposit receipt by the terms of which the bank were accountable to her or to anyone authorised by her to receive the same on the production and delivery up of the receipt. She parted with it to one, Lloyd, as security for a trifling loan, having first of all endorsed it. Lloyd subsequently obtained payment of the amount through his own bank.

*Held:* The plaintiff had not authorised Lloyd to receive the money. Her conduct did not estop her from asserting this, since the document was on its face a receipt and not an authority.

[1] (1843), 2 Hare 286.
[2] Cf. the doctrine applied in *London Joint Stock Bank, Ltd.* v. *McMillan and Another*, [1918] A.C. 777, discussed *supra*, p. 75. See also the judgment of Scrutton, L.J., in *Greenwood* v. *Martins Bank*, [1932] 1 K.B. 371, *supra*, p. 76.
[3] (1897), 13 T.L.R. 429.

*Prima facie*, it might be thought that a customer who has entrusted a deposit receipt to a third party should be estopped from denying the authority of the latter to receive payment, but as the instrument is not transferable its delivery is of no effect without an assignment.[1] The delivery of the receipt, in pursuance of an intention to transfer, amounts in equity to an assignment,[2] and a valid *donatio mortis causa* may be made in the same way.[3] An assignment of part of a balance on deposit can only be enforced in equity.[4] According to the general law as to assignment, notice should be given to the debtor in such a case, and the banker should and ought to wait for such notice. In modern times it is not uncommon for the deposit receipt to contain a condition that when payment is to be made to a third party a cheque must be drawn by the depositor in favour of such person. The assignee, however, is naturally in no better position than his assignor, and is not entitled to receive payment until the necessary seven days' notice has been given, and the deposit receipt surrendered.

In some cases the deposit receipt is issued with a printed form of cheque upon the back instead of a receipt form. In *re Dillon* [5] this appears to have been regarded as the equivalent of the receipt, in the absence of evidence as to the practice of the banks. There appears, however, to be no good reason why such an instrument, if properly filled up, should not operate as an effective mandate to the bank, though the conditions of the deposit receipt on its other side would appear to prevent the instrument complying with the statutory requirements of a bill of exchange.[6]

[1] The decision of Stuart, V.C., to the contrary in *Woodhams* v. *Anglo-Australian Life Assurance Co.* (1861), 5 L.T. 628, can only be justified, if it be justifiable at all, on the particular facts of that case.

[2] *Re Griffin*, [1899] 1 Ch. 408.

[3] *Re Dillon*, *supra*. A *donatio mortis causa* is a gift made in the imminent expectation of death. If the giver survives the gift is revoked.

[4] *Re Steel Wing Co.*, [1921] 1 Ch. 349.

[5] *Supra.*

[6] Paget, *op. cit.*, pp. 94–5, argues to the contrary, but appears to overlook the conditions as to notice and surrender of receipt.

Sect. 103 of the Stamp Act, 1891,[1] exempts deposit receipts from stamp duty: the receipt form, however, is not covered by this, and requires the usual two-penny stamp when the amount is £2 or more.

Method of repayment

The deposit account is usually operated by transfer to the current account, where one is kept, but this is rather a matter of convenience than of necessity.[2]

## THE PASSBOOK

Method of keeping account

It has long been the custom of bankers to keep and to render to the customer a detailed account of all payments received from or on his behalf and of all payments made to him or to his order,[3] and there can be little doubt that it is now their duty to do so. This account was, until recently, usually in a small book, a sort of ledgerette, called a passbook, which in effect contains a copy of the items as they appear in the banker's own books. Of recent years this passbook has generally been superseded by loose-leaf "statements" which are perforated and intended to be kept by the customer in a holder provided for the purpose. The legal position would appear to be the same whichever method be adopted.

The passbook

When the passbook is submitted to the customer it contains a statement of account by the banker. If the customer agrees to this, it becomes an "account stated."[4] When there is an "account stated" (sometimes called a "settled account") between two parties, it amounts to an implied contract that the balance will be paid as a lump sum by the party agreed to be in debt without reference to the individual items. It is, generally speaking, immaterial whether the balance be struck after consideration of cross entries, or whether the items are all on one side of the account, e.g. all

[1] 54 & 55 Vict, c. 39.
[2] Paget, *op. cit.*, perhaps suggests the contrary, but it is not essential that there should be a current account.
[3] This was already so in 1816; see *Devaynes* v. *Noble* (1816), 1 Mer. 530.
[4] *Devaynes* v. *Noble*, *supra*.

drawings.[1] The "account stated" is really a convenient legal fiction which avoids the necessity, if recourse has to be had to legal proceedings, of suing upon the individual items in the account, and it may be of great value where certain items have come within the Statute of Limitations. When an account has once been stated, the items become merged in the final balance, and can no longer be sued upon individually. It is always open to a party to the contract, however, to show that his consent was vitiated by mistake, fraud, or duress, and the account stated then falls to the ground,[2] unless it is a question of unimportant errors due to innocent mistakes, and even here a party will be allowed "to surcharge and falsify," i.e. to add or "surcharge" the items which he claims have been wrongly omitted, and to strike out or "falsify" the items which have been erroneously inserted. That is to say, in the former case the account ceases to be operative, in the latter it operates subject to amendments.

**Mistakes in customer's favour**

The account rendered in the passbook has, however, not uniformly been treated as an "account stated." The parties are not, in many cases, on an equal footing, for the banker employs servants skilled in this form of accountancy, while the customer is very often content to rely upon his banker's accuracy until mistakes are borne in upon him. Moreover there is usually no evidence that the customer agreed to the statement beyond the fact that he returned his passbook without objection. In the case of mistakes made by the banker in his customer's favour, the rule has been for over a hundred years that if the customer act upon them *bona fide* so as to alter his legal position, the banker will thereafter be estopped from claiming to have the mistake put right, i.e. he will be treated as if the sum which he erroneously credited to the customer was in fact due to him.

[1] See *per* Lord Wright in *Bishun Chand* v. *Lal* (1934), 50 T.L.R. 465.

[2] See *Re Webb, Lambert* v. *Still*, [1894] 1 Ch. 73, at pp. 83–6.

**ILLUSTRATION. HOLLAND v. MANCHESTER AND LIVERPOOL DISTRICT BANKING CO.**[1]

The customer's pass book showed a credit balance of £70. This was an error for £60. The customer on the faith of this representation drew a cheque for £65, which on presentation was dishonoured.

*Held:* In an action by the customer for damages for the wrongful dishonour of the cheque that the bank was liable.

The estoppel does not operate until the customer acts upon the representation contained in the inaccurate account, and up to that time the banker is entitled to rectify the error provided he notify the customer of his action.[2] There is no estoppel in favour of a customer who acts upon what he is aware to be a wrong entry, even if it was deliberately made by an official of the bank—proof of the customer's knowledge may, however, be difficult to come by.

**ILLUSTRATION. BRITISH AND NORTH EUROPEAN BANK v. ZALZSTEIN**[3]

The defendant was a customer of the plaintiff bank. At a time when his account was overdrawn, the plaintiff's manager for his own purposes, and in order to deceive auditors, placed £2000 to the credit of the defendant's account from another source. The account was subsequently debited with the same sum. The defendant was unaware of what had happened until afterwards, when the adverse balance was £2392. The plaintiffs sued him on this overdraft, and he counterclaimed that he was entitled to credit for £2000 formerly shown in his account.

*Held:* The defendant could not accept the credit without the debit; he must take the account as it stood.

**Mistakes to customer's detriment**

Discussion has centred chiefly on the cases where the wrong entries are to the customer's detriment. In the English cases so far as they go it does not appear that there is any estoppel against a customer who by returning his passbook to his banker, whether initialed or not, represents that the items are correctly stated.[4]

[1] (1909), 14 Com. Cas. 241, and see also *Skyring* v. *Greenwood* (1825), 4 B. & C. 281; *Holt* v. *Markham*, [1923] 1 K.B. 504.

[2] *Holland* v. *Manchester and Liverpool Banking Co.*, *supra*.

[3] [1927] 2 K.B. 92.

[4] The loose-leaf statements are not intended to be returned, so that the case for the customer here is still stronger.

Even if this amounts to a representation, which is questionable, it is difficult to see how the banker can act upon it so as to alter his legal position. In the ordinary case, which is that of mistaken omission this is clearly so, and it is unlikely that any banker would refuse to correct the item. The point has, however, been discussed in relation to a series of forged cheques paid by the banker, and debited to the customer in the passbook. It is clear that as soon as the customer challenges an item, investigation will be made and the scheme of forgery discovered. It has, therefore, been argued that the representation that the items are in order, made by the return of the passbook, induces the banker to continue paying upon the forgeries. This is not really so, the representation does not induce him to pay, though it may lead to his not discovering the forgery or "lull him to sleep." A customer who is aware that his cheques have been forged is under a duty to communicate that knowledge to his bank.[1]

**No estoppel**

An endeavour has been made to put the matter on another footing by the contention that the customer who does not examine his passbook and discover the errors is guilty of negligence, and that this negligence disentitles him from claiming to have the account stated set aside, or surcharged and falsified.[2] But before there can be negligence in law there must be a duty to take care. There appears to be no duty on a customer to read his passbook, so that there can hardly be a duty to exercise care in doing so when he does read it.

**No duty to examine**

### ILLUSTRATION. CHATTERTON *v.* LONDON AND COUNTY BANK[3]

The plaintiff had an account with the defendant bank. He received his passbook every week with the paid cheques in a pocket. He usually compared the entries with those

[1] See at p. 95, *ante*, *Greenwood v. Martins Bank*, [1933] A.C. 51.

[2] See this argument put in *Vagliano* v. *Bank of England* (1889), 23 Q.B.D. at p. 245, and Paget, *op. cit.*, p. 296, *et seq.*, for an elaborate discussion including reference to the American cases.

[3] This important case is fully reported only in *The Miller* newspaper (1890), but reference may be made to *Legal Decisions Affecting Bankers*, Vol. I, p. 110, where, however, only the proceedings at the first trial are reported, or to Paget, *op. cit.*, 299.

in his ledger and ticked them off in the passbook. He claimed in the action that twenty-five cheques which had been paid and debited were forgeries and that he was entitled to credit for the amounts so paid. The jury found there was no forgery, but a new trial was ordered. The defendants appealed, contending that, assuming the forgeries, they were not liable since the return of the passbook in that state was a representation that the entries were in order. The appeal was rejected. On the new trial the jury found for the plaintiff. They were directed that the questions were (i) whether the cheques were forgeries, (ii) whether the bank was misled by the plaintiff's conduct, and (iii) had the plaintiff by his conduct disentitled himself from recovering from the bank.

If such a duty were to exist, it should apply equally to prevent a customer from taking advantage of mistakes in his favour, despite the decisions from *Skyring* v. *Greenwood*[1] onwards. It appears to the writer that a duty to examine the passbook can only arise from an express agreement to that effect such as is insisted upon by some continental banks on the opening of the account.

Rule in *Clayton's Case*

The usual method of keeping the account by means of chronological entries in debit and credit columns has given rise to what is called the Rule in *Clayton's Case.*[2] This may come to be applied where dispute arises as to the setting off of items on one side of the account against items on the other (which will not occur if there be an "account stated"). In such cases the account must be treated as a whole, and the presumption is that the payments in on the one side are appropriated to and set off against the payments out on the other side, in the order in which they appear in the accounts, i.e. chronologically. This means that the first item on the credit side is cancelled or reduced by the first item on the debit side, and the balance, if any, is carried forward to the next item and dealt with in the same way.

**ILLUSTRATION. CLAYTON'S CASE**[2]

C had a current account with a firm of bankers. One of the firm died, and afterwards the bank failed. The account

[1] (1825), 4 B. & C. 281.
[2] (1816), 1 Mer. 572.

was kept in the ordinary way, i.e. chronologically. At the date of the partner's death there was a balance (say £X) in favour of C, i.e., he was entitled to that sum jointly against all the partners. Between that date and the failure of the bank C had drawn out more than this sum, but he had paid in further sums which exceeded those received. C claimed that his drawings from the date of the partner's death must be treated as if they had been paid out of his payments in since that date leaving £X still due from the banking firm as constituted when the partner died. This amount he claimed to recover from the estate of the deceased partner.

*Held:* The presumption was that, since there was a running account, the payments in on the one side were intended to be appropriated to the payments out on the other in the order in which they took place, so that at the time of the failure of the firm the £X had been paid away.

At a time when banking was carried on by a large number of private partnerships, the rule in *Clayton's Case* was naturally very important. Now that it is mostly conducted by a few large public companies, the application of the rule must be looked for in other directions. Perhaps the most important of these is to be found in the fact that a secured overdraft or loan may become extinguished by payments in, while the subsequent drawings may not be protected by the security.

**Applied to reduce or extinguish security**

**ILLUSTRATION. DEELEY *v.* LLOYDS BANK**[1]

In 1893, one, G, secured an overdraft for £2500 on his account by means of a mortgage. Later, in 1895, he raised a loan from the plaintiff by a second mortgage on the same property. Of this the defendant bank had notice. G made various payments into his account, which by 1896 amounted to £2500, but over the same period was continuously drawing on his account, though never so that his overdraft exceeded £2500. The bank afterwards realised the security and G became bankrupt. Later D brought proceedings against the bank on the basis that he had become entitled to the security which had been realised, and that the bank must therefore account to him for the proceeds.

*Held:* That by the rule in *Clayton's Case* the original loan had become extinguished in 1896 and that the

[1] [1912] A.C. 756.

subsequent advances must therefore rank after the plaintiff's second mortgage. D was entitled to recover and the bank in effect became unsecured creditors.

A presumption only

The rule is also important in connection with guarantees[1] where it may operate in exactly the same way to reduce or even extinguish the guaranteed overdraft or advance.

The rule in *Clayton's Case* is founded on the presumed intention of the parties, and can be rebutted by evidence that the intention was to the contrary. The customer may, therefore, always avoid the incidence of the rule by appropriating his payments in to meet some special commitment or to some special account. Similarly, a banker who had made an advance against charge or mortgage on receiving notice of a second charge could always insist on a new account being opened for subsequent transactions. It is indeed a standing rule of most banks that this shall be done, and it was the inadvertent omission to comply with this rule which led to the decision in *Deeley* v. *Lloyds Bank*.[2]

How the money reaches the account

Money may reach the account in cash or banknotes paid in by the customer, or on his behalf; or in the form of credits from the proceeds of the sale of securities on the customer's behalf by the banker; or from the discounting of his bills; or from the collection of cheques and other negotiable instruments by the banker acting as the customer's agent; or from the receipt of dividends or interest on debentures whether directly, or on presentation of the customer's coupons. This summary, though it covers the main sources of increment, is not exhaustive. Some of these, such as the collection of cheques, are of great importance, and are dealt with in some detail in other parts of this book.[2]

## THIRD PARTY CLAIMS

Is the money in the account the customer's money?

It may happen, however, that the money received for the benefit of the account was not the customer's

[1] As to which see Chapter XI.
[2] *Supra*.

own money. If this be so, the banker will quite possibly be faced with a claim from the true owner for repayment which will be couched in the form known as "money had and received to the plaintiff's use."[1] This must be distinguished from an action for conversion brought, e.g. by the true owner of negotiable instruments or other property wrongfully handled by bankers on their customer's behalf.[2] Money is not susceptible of conversion.[3] Moreover, the mere fact that the banker receives cash from a customer who has no right to it does not found an action for money had and received.[4] It is a primary characteristic of currency that it may pass from hand to hand without any question as to title, and this must be so just as much when it is lent to a banker as when it is used to purchase goods. Any other rule would make commerce and banking as we know them to-day impossible. A banker cannot therefore normally be required to repay money to a person from whom his customer has stolen it or otherwise wrongfully obtained it, but when the money originated in securities handed to the banker by the customer for collection the banker will be liable to the true owner if the customer's title was defective.[5]

To the general rule, however, there are important exceptions, and it is where they apply that action may be brought for money had and received by the true owner. These exceptions fall into two main categories: (i) where there has been lack of *bona fides* on the part of the banker, or (possibly) some gross negligence on his part. In these cases the banker may be forced to Exceptio

[1] The student should be familiar with this form of action from his study of contract law under the head of quasi-contracts, sometimes classified as contracts implied by law: the legal fiction being that there is an implied contract by the person who has wrongfully received money to repay it to the true owner.

[2] See p. 117, *ante*.

[3] Conversion here means the tort which must be distinguished from criminal conversion.

[4] "Money had and received" was a method of suing in the old common law courts, and the expression survives to describe the obligation of one person to pay over to another money which he had received on his behalf, or in such circumstance as to give rise to a duty to pay it over to him. See Anson's *Law of Contract*.

[5] See Chapter VI.

make repayment to the true owner, even though he has already paid away the money received from the customer by honouring his cheques or otherwise: (ii) where the fund in question can be clearly traced to the bank account and remains sufficiently distinct for it to be equitable to order the banker to repay it. In such cases the banker will not have paid the money away, and moreover cannot be compelled to surrender it to the true owner until his own rights of lien and set off have been satisfied.[1]

**Trust accounts**

From the banker's point of view, the first of these exceptions is much the more important and in practice almost invariably involves the operation of what is in reality a trust account, though it may not be known as such to the banker. The cases where it can be alleged that the banker knew or ought to have known that the money paid into an account was stolen or otherwise misappropriated must be so rare as to be almost non-existent. The cases are more common where it can be plausibly alleged that a banker knew or ought to have known that a customer, who was a trustee or in the position of a trustee, was paying trust moneys into his own private account, or what comes in practice to the same thing, though it is theoretically a different question, had been drawing on a trust account for his own private purposes. This is partly due to the fact that many breaches of trust are not without moral justification, and a bank official may therefore be privy to them without dishonesty, but much more to the fact that since he keeps the account or accounts in question the banker may have material on which he ought to have known that a breach of trust was taking place.

The obligation of the banker in respect of trust moneys is stated by Hart as follows:[2] "a banker who receives into his possession moneys of which his customer has, to his knowledge, become the owner in a fiduciary character, contracts the duty not to part with them, even at the mandate of his customer, for purposes

[1] See Chapter XI, for lien.
[2] *Op. cit.*, p. 199.

which he knows are inconsistent with the customer's fiduciary character and duty." In order to prove that a banker has been guilty of a breach of this duty, it is necessary to establish (*a*) that the banker was aware that the money which he paid away at the customer's order was trust money, and (*b*) that the payment so made was made in breach of trust. In cases where, e.g. on bankruptcy of the customer, the banker wishes to establish a right to set off a balance in a trust account against an overdraft on another account in the name of the same customer proof of (*a*) alone will be sufficient to prevent his doing so.[1]

Trust funds

Accounts are often specifically opened as trust accounts, or, what amounts to the same thing, the account is described, e.g. as F. E. Jones (B. Smith's Trust). The cases which cause difficulty, however, are those which are not described in terms as trust accounts but where the facts are such that the banker must be taken to have knowledge of their character. This may result from the actual circumstances of a particular case and give rise only to questions of fact, though they may be difficult. In a number of cases, however, the question will be whether the banker should have drawn an inference from the position or profession of his customer. An account kept by a public official *qua* official is obviously to be regarded as a trust account.[2] Similarly with an account opened by an executor as such.[3] Generally speaking, however, the fact that a customer belongs to a profession where he would commonly be expected to hold money in trust for others, such as a solicitor for clients, an auctioneer for his principals or a stockbroker for his clients raises no presumption that his account is a trust account,[4] and this is so even if he keep two

[1] *Re Gross Ex parte Kingston*, (1871), 6 Ch. App. 632. The case of *Coleman* v. *Bucks and Oxon Bank*, [1897] 2 Ch. 243 is perhaps to the contrary, but may be distinguished on its somewhat special facts. In the writer's opinion, however, it was wrongly decided.

[2] *Re Gross, Ex parte Kingston, supra.*

[3] *Foxton* v. *Manchester and Liverpool District Banking Co.* (1881), 44 L.T. 406.

[4] *Thomson* v. *Clydesdale Bank*, [1893] A.C. 282.

accounts[1] though here the description of one of the accounts may be such as to raise the inference that it is a trust account. Since the Solicitors Act, 1933,[2] the banks will be fixed with knowledge as to the character of solicitors' accounts. The client's account which must be kept under that statute is definitely a trust account.[3]

**ILLUSTRATION. THOMSON *v.* CLYDESDALE BANK**[4]

The appellants were trustees of certain shares which they instructed a broker to sell, and to deposit the proceeds in a certain way. The broker sold, and received in payment a cheque payable to his own order which he paid into his own account at the respondent bank. His account was overdrawn to an amount greater than that of the cheque. The bank were aware that the money came from sale of shares, but did not in any particular case know whether or not the money was in his hands as agent. The broker became insolvent, and the bank used the cheque to reduce the overdraft.

*Held:* They were entitled to do so, not being imputed with knowledge of any breach of trust.

Notice of breach of trust

A banker may have notice that a certain account is a trust account, and yet not be liable to the *cestui que trust* when the trustee has drawn upon it in breach of trust for he must be shown to have taken part in the breach of trust, or been privy to it. It would seem, however, that when the banker has notice that the money is trust money, comparatively little is required to fix him with notice of breach of trust if such take place.

**ILLUSTRATION. JOHN *v.* DODWELL & CO.**[5]

The respondents had authorised their manager to draw cheques in their name on their banking account. He made

[1] *Greenwood Teale* v. *Williams' Brown & Co.* (1894), 11 T.L.R. 56.

[2] 23 & 24 Geo. V, c. 25, which empowers the Law Society to make orders for the keeping of separate accounts by solicitors of their clients' money. By Sect. 8 there is to be no extra liability on the bank where the account is kept.

[3] See Solicitors Act, 1933, s. 4.

[4] *Supra.*

[5] [1918] A.C. 563. It must be admitted, however, that some of the cases are somewhat difficult to reconcile on the facts, e.g. *Coleman* v. *Bucks and Oxon Union Bank*, [1897] 2 Ch. 243, see also *Gray* v. *Johnston* (1868), L.R. 3 H.L. 1. It may well be that the tendency of the present time is to emphasise the need of care.

use of this power to buy shares for himself, paying cheques so drawn to the appellants who were brokers. They received them honestly, but knowing that he was drawing on his employer's account.

*Held:* The employers were entitled to recover from the brokers.

Per Lord Haldane, L.C., "when an agent is entrusted by his principal with property to be applied for the purposes of the latter, he is in a fiduciary position and any third person taking from the agent a transfer of the property with knowledge of a breach of duty committed by him in making the transfer holds what has been transferred to him under a transmitted fiduciary obligation to account for it to his principal."

It would also appear that when the banker stands to gain by the breach of trust, e.g. when it reduces an overdraft, the onus of proof becomes heavily upon him to show that he was in no way privy to the breach of trust.[1] "If it be shown that any personal benefit to the bankers themselves is designed or stipulated for, that circumstances above all others will most readily establish the fact that the bankers are in privity with the breach of trust."[2] The transfer of funds from a trust account to the trustee's personal account calls for explanation and would normally in the absence of reasonable explanation fix the banker with notice of the breach of trust.

**ILLUSTRATION. BODENHAM *v.* HOSKYN**[3]

A receiver appointed to collect the rents and profits o an estate belonging to the plaintiff had a private account with the defendant, a banker. He then opened an account as receiver in the name of the estate under circumstances which made it clear that he was constituting it a trust account. He afterwards drew a cheque on the estate account, and paid it into his private account which was credited in due course. The plaintiff sued to recover the amount.

*Held:* The defendant was liable to repay the amount of the cheque.

Trustees, however, have, *prima facie*, full control

[1] *Gray* v. *Johnston, supra.*
[2] *Ibid., per* Lord Cairns at p. 11.
[3] (1852), 2 De G. M. & G. 903.

over trust funds, and it is normally not for a banker to challenge a trustee customer's use of the money in the trust account except when he transfers it to his private account (as to which see above) or, what would appear to fall into the same category, was obviously spending it for his own personal purposes. Certain types of professional and business men, such as solicitors and stockbrokers, are continually paying away their clients' money under instruction, and if on occasion they pay it away contrary to instruction the banker with whom it is kept cannot be expected to know this, or indeed to take any official precaution to prevent its happening.

**Following trust funds**

The banker, however, may be faced with a demand to surrender funds which have been paid into an account by a customer made by a third party who claims that they are his. Such claims may give rise to difficult legal problems but they are only indirectly a matter of banking law, for the banker can always avoid them by the procedure of interpleading, under which the money is paid into Court and the customer and the party claiming it are left to fight out the question of who is entitled.[1] The following matters, however, may be shortly noticed—

(i) The first question is whether the money has ever reached the customer's account. This is not very likely to arise in practice, but where the misdoing of the banker supervenes it will have to be decided whether negotiable securities left with him for collection had actually reached the account at the time when the banker suspended payment. This depends on principles discussed in Chapter VI.[2]

[1] Interpleader proceedings are governed by Order 53 of the Rules of the Supreme Court. They need not be discussed here in detail, but as they may be useful to a banker in several different sets of circumstances, e.g. where he has assumed safe custody of goods which are now claimed adversely to the customer's title, it may be said that they are a form of legal procedure by which when there are conflicting claims to property which is in the hands of a person who does not claim it himself, the conflicting claims may be settled by the Court in proceedings in which the person having custody does not take part beyond the initial step of initiating them.

[2] See pp. 115, *et seq.*, *ante*.

**ILLUSTRATION. RE FARROW'S BANK**[1]

A cheque was paid into Farrow's Bank by a customer. Not being a member of the Clearing House, Farrow's Bank forwarded it to their agents Barclay's Bank for collection. It was not cleared until a few hours after Farrow's Bank stopped payment. Barclay's Bank retained the proceeds of the cheque until it should be ascertained whether the money was still the property of the customer or whether it belonged to Farrow's Bank, i.e. to the liquidators.

*Held:* That the customer was entitled. Since the money had never reached his account it had never been lent to the bank.

(ii) If the money in question did reach the account, the second question will be whether it is still there. In deciding this the rule in *Clayton's Case*[2] will have to be applied. In the case of trust moneys paid into a private account, however, there is an important exception to this rule, or rather the one presumption is defeated by another, viz. the presumption that the customer intended his payments in to be set against his drawings in chronological order will not apply in the case of a trustee for he is presumed to have acted honestly and in accordance with his trust, and therefore to have only drawn out his own money and left the trust funds intact. This is called the Rule in *Hallett's Case*.[3]

(iii) If then the money is still in the account, the banker can only be made to give it up if its identity has not been lost, i.e. if it has not become merged in or blended with other moneys in the account so as to be indistinguishable. If a bag of stolen sovereigns were handed to the banker, it could clearly be recovered by the true owner, and if the sovereigns in the bag had been used by the banker on his customer's instructions to purchase certain stocks and shares, the money could be traced to this security. In such a case the Court will, if necessary, make what is called a tracing order. In modern times the Courts have been very ready to give assistance in this type of case. The development

[1] [1923] 1 Ch. 41, illustrated also at p. 114, *ante*.
[2] See p. 168, *ante*. [3] (1879) 13 Ch.D. 696.

of the methods by which the true owner can follow his money, and the evolution of the tracing order indeed furnish a happy instance of the adaptation of legal means to business ends.

**ILLUSTRATION. BANQUE BELGE POUR L'ETRANGER *v.* HAMBROUCK**[1]

A cheque was obtained by fraud and paid into a bank account. The proceeds were afterwards drawn out and paid over to the defendant without consideration. She paid the amount into her account at her own bank. The plaintiffs claimed the amount of the cheque from the defendant's bank which interpleaded and the defendant was made defendant to the proceedings.

*Held:* That the money could be followed and recovered, though it had passed through two accounts.

But if in this case the defendant having received the money innocently had paid it away, even to the fraudulent person from whom she received it, she could not have been made liable to refund it.[2]

While it is always safe and usually wise for the banker to interplead when he is faced with conflicting claims, it must be remembered that, short of interpleader, the banker's primary obligation is to his customer, so that unless there is clear evidence that it would involve a breach of trust he should not dishonour his customer's cheque just because a claim has been made by some third party.

**ILLUSTRATION. TASSELL *v.* COOPER**[3]

The plaintiff had paid into his account at the defendant's bank a cheque received in payment of goods sold for his employer. The latter wrote to the banker asking him not to part with the balance in the plaintiff's account and offering an indemnity for so doing. They accordingly dishonoured certain of the plaintiff's cheques.

*Held:* That the plaintiff was entitled to damages.

A person in the position of the employer in the above case may therefore need to apply to the Court for assistance. He can do this by bringing proceedings

[1] [1921] 1 K.B. 321.
[2] *Transvaal & Delagoa Bay Investment Co., Ltd.* v. *Atkinson & Wife* [1944] 1 All E.R. 579.
[3] (1850) 9 C.B. 509.

against the customer for the repayment of the money in question, in which proceedings the banker may be joined as a defendant. An interim injunction restraining the banker from paying away or dealing in any way with the balance of the customer's account or at any rate with a sufficient part of it to satisfy the plaintiff's claim may then be granted. It is essential, however, that the customer should be before the Court, for it would be unjust to restrain a banker from honouring his customer's cheques in the absence of the latter.[1]

A further case where the banker may have to give up moneys or securities received on behalf of a customer occurs when they have been paid or delivered to him under a mistake. This obligation exists, however, only so long as they are still in his hands.

**ILLUSTRATION. ADMIRALTY COMMISSIONERS v. NATIONAL PROVINCIAL BANK**[2]

A naval officer had an account with the defendants into which the Admiralty were in the habit of paying amounts due to him. The officer died, but the Admiralty, in ignorance of this, continued to make the payments.

*Held:* The money had been paid under a mistake of fact and was recoverable as money had and received by the defendants to the plaintiff's use.

The closing of the account terminates the relationship of banker and customer, and is discussed in Chapter XII. Where, however, the customer has more than one account, he may close one of them without terminating the relationship, e.g. by transferring funds from one to the other. Closing account

[1] Cf. *Fontaine-Besson* v. *Parr's Bank* (1895), 12 T.L.R. 121, where an injunction was refused on that ground.
[2] (1922), 38 T.L.R. 492.

# CHAPTER IX

## SPECIAL ACCOUNTS

THE rules explained and discussed in this volume relate unless otherwise indicated to adult customers of full capacity. The banker's customer may, however, be a person of limited capacity, or several persons acting in a joint capacity, or a corporation whose personality is artificial. In such cases difficult questions as to the extent of the legal capacity of the customer, or as to his powers, may well arise, and it is proposed in this chapter to discuss some of these.

### INFANTS

Infants

The infant customer gives rise to very great technical problems, but the absence of decided cases suggests that in practice these do not cause much trouble.

The first question is whether, legally speaking, an infant can have an account with a banker at all in the sense of the ordinary contractual relationship which that word implies. It will be remembered that contracts made by infants may be (i) void, or (ii) voidable, or (iii) good and enforceable. Those which fall under the Infants' Relief Act, 1874, are void. One type of such void contracts is those "entered into by infants for the repayment of money lent or to be lent."[1]

This is somewhat ambiguous for it is not made clear whether contracts by which infants lend as well as those by which they borrow are made void. If only the latter were intended to be covered, the words "by the infant" should appear after the word "repayment." It has accordingly been suggested that loans by infants are irrecoverable, and if this be so the contract between banker and infant customer, being in substance one of loan, would itself appear to be void. In view of the title and object of the statute, however, it seems

[1] 37 & 38 Vict., c. 62, s. 1.

inconceivable that the Court should take such a technical view of the wording, and the opinion here adopted is that loans made by infants are recoverable. If this be so, it would appear to be an academic question whether the contract is binding on the infant, or voidable at his option, since he is unlikely to avoid it while it shows a balance. It seems, however, that there is no reason at all why a banking account should not be regarded as a necessary for a well-to-do infant, many of whom in practice have such an account. If this be so, the contract is binding on the infant; that is to say he can be properly debited with any charges and commissions due, and it is even arguable that he can be sued for overdrafts, on the ground that the overdraft is not to be regarded as a contract of loan to the infant but as an incidental service rendered under the main contract. The question is not so academic as might at first sight appear. The opinion, however, is generally held that, in respect of overdrafts at any rate, there is no legal obligation to repay and that no overdraft should be allowed to an infant unless it is properly secured. **Overdrafts**

The problem of effectively securing an infant's overdraft is, however, not easy of solution. The matter can only be touched on here as it involves very technical considerations. The following points may, however, be made—

(*a*) Any security given by the infant himself is within the mischief aimed at by the Act and will equally be void.[1]

(*b*) The usual method is therefore the guarantee of an adult. But it is not certain that this is effective. According to Halsbury's *Laws of England*,[2] a guarantee given in respect of an infant's debt is void. This view seems to the author to be founded on a misreading of the authorities, and is not accepted, but it must obviously be treated with respect.[3]

[1] *Nottingham Building Society* v. *Thurstan*, [1903] A.C.6.

[2] Second Ed. Vol. XVII, Art. 27, note S.

[3] The case chiefly relied upon in Halsbury is *Wauthier* v. *Wilson*, 28 T.L.R. 239, which was an action brought against a father as

Infants' cheques

There remains the question of the validity of the infant's cheques. It is, of course, clear that the holder of an infant's cheque cannot enforce it against him.[1]

This, however, does not affect the question whether regarded as a mandate on his banker the infant's cheque is effective. If the contract between banker and infant customer is not void, as has been submitted above, there appears to be no valid reason why the customer should not obtain repayment of his debt by means of drawing cheques, nor would it seem to be material that in some cases he requires the repayment to be made to his nominee the payee or holder of the instrument. This question has only once, and then indirectly, come before the Courts, viz. in *Calland* v. *Lloyd*,[2] where Lord Abinger expressed the view that an infant could not effectively draw a cheque nor recover money held to his account by a banker until he attained his majority. This opinion was not necessary to the decision of the case in question, and cannot be regarded as decisive. Such a view would appear to necessitate holding the banker a constructive trustee of the infant's money in the meanwhile, and it is submitted that this would be completely out of accord with the business requirements of the situation.

## MARRIED WOMEN

Married women

Under the various Married Women's Property Acts,[3] married women have full power to contract, and bind their separate estates. This means that they can open and operate bank accounts as fully as their husbands. It may from time to time happen that money which is

joint signatory of a promissory note with his infant son, and given in respect of his son's debt. The trial judge held the father liable as a surety, but the Court of Appeal considered him directly liable on the note. They do not appear to have intended to overrule the reasoning of the trial judge on the surety point. In *Garrod* v. *James* [1925] Ch. 616, a distinction was drawn between the guarantee of a void and an illegal transaction; the latter cannot be guaranteed, the former can.

[1] Bills of Exchange Act, 1882, s. 22.

[2] (1840), 6 M. & W. 26.

[3] Particularly that of 1882, s. 7, and the Law Reform (Married Women and Tortfeasors) Act, 1935, 25 & 26 Geo. V, c. 30.

in reality the husband's finds its way into the wife's account, but in the absence of fraud of which the banker is cognisant he would not appear to come under any liability, e.g. to the husband's trustee in bankruptcy for having paid away such sums on the wife's cheques.[1] If the money is still in the account it may be possible for the true owner to follow it.[2]

## JOINT ACCOUNTS

Joint accounts

A joint account occurs when two or more customers have one account. The parties to a joint account are considered in law as if they were one person, and therefore, *prima facie*, all of them must join in taking any action with regard to the account, as when drawing cheques. The circumstances of such accounts, however, differ considerably, e.g. in the cases of partnership and trust accounts, and it will be necessary to consider these separately.

Authorisation to draw on account

The fact that joint action by all parties is necessary is a great safeguard against fraud, e.g. the case of trustees or where it is desired to secure that a sum of money should be placed in the hands of a third party to await the determination of some dispute, such as an action at law. From a practical point of view, however, this necessity is a great inconvenience. It can as a general rule be surmounted by the nomination by all the parties of one or two of their number to act on behalf of the others, or indeed of some third party such as a solicitor. It is desirable that such an authorisation should be given in writing and signed by all the parties to it. The authorisation may, of course, contain restrictions upon the duly appointed agent's power to operate the account. It must be exhibited to the bank which will take a copy and pay careful attention to any conditions and restrictions.

Survivorship

One of the most important features of joint ownership is that on the death of one of the joint owners his rights pass to the other joint owners and not to his personal

[1] See *Re Montague, Ex parte Ward* (1897), 76 L.T. 203.
[2] As to this see p. 170, *ante*.

representative (executor or administrator). According to this rule, the rights of a joint party in a banking account pass on death to the other joint parties. The rule is not, however, a rigid one, and if it can be shown that the intention of the parties at the time of opening the account was that it should not apply, effect will be given to this intention. Moreover, the tendency of the Courts in modern times has been against the doctrine of survivorship. In banking practice, difficulties appear to arise most frequently in connection with accounts opened jointly by husband and wife. Sometimes all the money going into the account will belong to the husband, and the wife is only a party to it for the purpose of drawing cheques for household expenses. On the other hand, the money may all be that of the wife, the husband being a party in order that he may advise or control the wife as to expenditure. In such cases there would appear to be no survivorship.

**ILLUSTRATION. MARSHAL *v.* CRUTWELL[1]**

An account was opened at a bank in the joint names of husband and wife. The husband was in failing health. All the money paid in to the account was proved to belong to the husband, and the wife's drawings were on account of household necessaries only. The husband died.

*Held:* That the presumption of survivorship was rebutted, and the executors and not the widow were entitled.

A joint account of husband and wife can only be treated as that of the husband if there is good evidence to that effect; and a credit in it is not, therefore, *prima facie* open to be garnisheed in respect of the husband's debt.[2]

## PARTNERSHIPS

**Partnership accounts**

A common type of joint account is that opened by a firm or partnership. Each partner is, however, the agent of his firm to conduct transactions within the scope of the business, and this gives him the right to

[1] (1875), L.R. 20 Eq. 328; see also *Harrods, Ltd.* v. *Tester* (1937), 157 L.T. 7.

[2] *Hirschorn* v. *Evans* (*Barclay's Bank Garnishee*), [1938] 2 K.B. 801.

open a banking account in the firm's name, to operate it by means of his own individual signature on cheques and indeed to close it.[1]

This extends apparently even to stopping cheques drawn by another partner in the firm's name. The authority, however, is only *prima facie* and may not in fact exist under the articles of partnership of the firm. These commonly provide that cheques shall be signed by at least two of the partners, and if the banker is aware of any such limitation he clearly cannot properly honour a cheque drawn by one member of the firm. If he has no knowledge, the important question arises whether he should take reasonable steps to inform himself. There is no decision on this point, but in view of the stringent requirements as to the precautions to be taken on the opening of an account which have been considered to be necessary in such cases as *Lloyds Bank* v. *Savory & Co.*,[2] it would seem that there would be grave risk in his failing to do so. It is common knowledge that most firms are constituted on the terms of articles of partnership and these ought to be inspected, and if this is refused, an authorisation as to drawing of cheques should be obtained from the partners. In practice a written instruction or mandate as to the operation of the account will usually be taken when it is opened.

It should be observed that the implied authority of a partner is to open the account in the firm's name and not in his own name.

**ILLUSTRATION. ALLIANCE BANK *v.* KEARSLEY**[3]

The defendant, W. K., carried on business in partnership with G. K. G. K. managed a branch of the business in Manchester; W. K. managing the other branch at York. G. K. opened an account for his firm with the plaintiff bank at Manchester in his own name, explaining that he was in charge of the Manchester business and would alone sign the cheques. The account became overdrawn, and G. K. being insolvent, the plaintiffs sued W. K. on the

[1] Partnership Act, 1890, 53 & 54 Vict., c. 39, ss. 5 & 6.
[2] [1933] A.C. 201, and see p. 126, *ante*.
[3] (1871), L.R. 6 C.P. 433.

firm's account. The action failed on the ground that there was no implied authority in a partner to bind his firm by opening an account in a name other than that of the firm.

The question of authority to overdraw is obviously one of the most important which arise in connection with partnership accounts. It is part of the ordinary business activity of a trading concern to borrow money and therefore a partner in a general commercial and trading firm has implied authority to overdraw.[1] Here again, however, the bank may have information which shows that this authority has been withdrawn. The right to borrow implies the right to give security from the partnership assets. A professional or non-commercial partnership does not normally borrow money, so that in such cases no implied authority to overdraw exists. It is not easy to forecast which view the Courts will take as to whether a partnership is of a general commercial character, e.g. a cinematograph theatre has been held not to be such a partnership.[2] The only safe rule as regards overdrafts is to obtain the authorisation of all the members of the firm.

The dissolution of the partnership naturally revokes the authority of a partner to deal with the firm's account, and it must be remembered that the death or bankruptcy of any partner dissolves the partnership as a whole.[3] Unless therefore the terms of the articles of partnership or of the mandate lodged with the banker permit it he should not pay cheques after receiving notice of any of these events, for the doctrine of survivorship does not apply to partnership accounts. The effect of this will be that where surviving partners continue the business, securities accepted from a deceased, bankrupt, or outgoing partner will not be chargeable with later overdrawings.[4] For the purpose of winding up the firm, however, the authority of surviving partners continues—also for the completion

[1] *Bank of Australasia* v. *Breillat* (1847), 6 Moo. P.C. 152, at p. 193; Partnership Act, 1890, s. 7.
[2] *Higgins* v. *Beauchamp*, [1914] 3 K.B. 1192.
[3] Partnership Act, 1890, s. 33.
[4] *Bank of Scotland* v. *Christie* (1840), 8 Cl. & F. 214.

of transactions begun but unfinished at the time of dissolution.[1] A deceased partner's share of the assets might presumably be validly pledged for these purposes.[2]

## EXECUTORS

Executor's accounts

The account of an executor or executors or of an administrator is to be regarded as that of the deceased's estate, but it is for many purposes like that of a partnership. Each executor has power to deal with the assets and therefore to open and operate a banking account, but the other executors are entitled to countermand his actions.[3] On the other hand, an executor acting alone is not the agent of his co-executors and it is therefore immaterial, e.g. that one of the others should have died.

The business of executors is to wind up the estate. They have, therefore, no power to carry on the testator's business or to borrow money for that purpose unless authorised by the will or in connection with the winding up. Should they do so it is their own personal responsibility, and the lender can sue them only in their personal capacity and not make the estate of the deceased liable.[4] Bankers will therefore only allow overdrafts if the executors are substantial persons, or security is given. An executor has power to dispose of the estate and must therefore have power to pledge and charge the assets, and a banker may safely make advances against such assets provided he is offered sufficient security, has no knowledge of any breach of trust, and the assets are specific, the security not being a general charge on the estate.

### ILLUSTRATION. BERRY *v.* GIBBONS[5]

An executrix opened an account as such with a bank and later pledged with them a picture belonging to the

[1] Partnership Act, 1890, s. 38. [2] See *Re Bourne*, [1906] 2 Ch. 427.

[3] In *Gaunt* v. *Taylor* (1843), 2 Hare 413, an executrix drew a cheque which was countermanded by fellow executors before it had been honoured. The banker paid into Court and the propriety of his action was not challenged.

[4] *Farhall* v. *Farhall* (1871), 7 Ch. App. 123. Even where they borrow properly for such a purpose they are liable in the first instance.

[5] (1873), 8 Ch. App. 747.

estate to secure an overdraft. Some time earlier administration proceedings had been brought by creditors against the executrix, and a decree made for administration. The bank, however, were unaware of this, and it was held that they were entitled to enforce their security.

Even before a grant of probate has been obtained the executors have power to charge the assets, e.g. they may require a loan for preliminary expenses, such as to pay estate duty.

## TRUSTEES

**Trust accounts**

A trustees' account is a joint account. Moreover, trustees are not, with certain wide exceptions, entitled to delegate their duties to others unless authorised to do so in the will or deed establishing the trust. Trustees are entitled to lend money and to deposit securities at a bank,[1] but if there are more than one all should join in opening the account, and in drawing cheques thereon, or in authorising the delivery up of trust property held for safe custody or other purpose. The banker will act on the authority of one at his peril, unless an examination of the trust instrument satisfies him that such powers have been conferred upon the trustee in question.

This rule may give rise to difficulties where one of several trustees has absconded, or in an emergency cannot be found. Provision has been made for this by the Trustee Act, 1925,[2] in one case, viz. that of a trustee going abroad for more than one month. In such a case, the absent trustee may delegate his powers and duties by means of a power of attorney, but cannot appoint a sole co-trustee as such attorney unless a Trust Corporation. In other cases, application must be made to the Court for directions, and in the meanwhile the banker will exercise his discretion as to taking the risk of making payments upon the signatures of the available trustees.

Trust moneys may find their way into other than

[1] See Trustee Act, 1925 (15 Geo. V, c. 19), s. 7

[2] See s. 23.

trust accounts. The question of whether the banker is liable to account for those depends on considerations which are discussed elsewhere.[1]

Corporations

There are two types of corporation customers, which call especially for discussion, viz. the trading corporation, usually a limited company formed under the Companies Act, 1929,[2] and the municipal corporation or local authority, which, as will appear, is technically not a customer at all.

## TRADING COMPANIES

Trading Corporations

Trading companies and other companies governed by the Companies Act, 1929, provide the banks with a large proportion of their most important customers. A trading corporation can do business in much the same way as an individual business man. It can, *prima facie*, have a banking account, draw cheques, and accept and negotiate bills or other negotiable securities. Difficulties, however, arise from action by those who control the management of such companies in excess of their authority. In such cases the question is whether the company can be made liable for the acts of its officers or servants. The Companies Act, 1929,[3] provides that "a bill of exchange or promissory note shall be deemed to have been made, accepted, or endorsed on behalf of a company if made, accepted, or endorsed in the name of, or by or on behalf or on account of the company by any person acting under its authority." The wording of this section has been much criticised.[4]

It has been pointed out that cheques are not specifically referred to and that the appropriate word for bills of exchange, viz. "drawn," does not occur. As Paget says, however, it is "unthinkable" that cheques should be excluded from the section. Even if they were, however, it could hardly be contended that companies under the Act have no power to draw them.

[1] See Chapter VIII, p. 170, *et seq.*, *ante*.
[2] 19 & 20, Geo. V, c. 23.
[3] See s. 30.
[4] Cf. Paget, *op. cit.*, p. 16.

The real weakness of the section, however, is that it gives no indication of the meaning to be placed on the words "acting under its authority." If these words are to be taken literally, they would appear to mean actual authority. It is clear, however, that a company will be bound by the acts of its servants which are within their ostensible authority, e.g. by the acceptances of its managing director;[1] always provided that the memorandum and articles of association permitted a delegation of such authority.[2]

In regard, however, to such an important matter as the authority to draw cheques, it is considered that this should always be expressly conferred. It is highly desirable that the banker should in turn receive an express authority from the officers of the company as to the drawing of cheques, and it is probably a duty which he owes to a company customer that he should do so. Normally the secretary and one or two directors will be empowered to sign. It is also necessary for the banker to assure himself that such an authorisation could have been properly conferred by the memorandum and articles of association. These documents "are open to all who are to have any dealings whatsoever with the company and those who so deal with them must be affected with notice of all that is contained in those two documents."[3] It is not, however, necessary for the banker to go further than this, and satisfy himself that the authorisation which has been communicated to him was duly and formally conferred. Authority to sign cheques will normally be conferred by resolution of the board of directors and this should appear in the minutes. It would not appear to be necessary to inspect these minutes; the banker

[1] See *Dey* v. *Pullinger Engineering Company*, [1921] 1 K.B. 77, dissenting from *Premier Industrial Bank* v. *Carlton Manufacturing Company*, [1909] 1 K.B. 106.

[2] This is the well-known rule in *Royal British Bank* v. *Turquand* (1856), 6 E. & B. 327, for the facts of which see p. 306, *infra*, which must be studied in the light of *Houghton & Co.* v. *Nothard, Lowe and Wills*, [1927] 1 K.B. 246, and *Kreditbank Cassel* v. *Schenkers*, [1927] 1 K.B. 826.

[3] See per Lord Hatherley in *Mahony* v. *Liquidator of East Holyford Mining Co.* (1875), L.R. 7 H.L. 869 at p. 893.

is entitled to rely upon a communication as to their effect from those ostensibly carrying on the business of the company.

**ILLUSTRATION. MAHONY v. LIQUIDATOR OF EAST HOLYFORD MINING COMPANY[1]**

Wadge, with some friends and dependants, started a mining company, and various persons took and paid for shares, the proceeds being paid into a bank of which Mahony was the public officer (the National Bank). The account was opened in the name of East Holyford Mining Company. No meeting of shareholders was ever held, nor any director or secretary properly appointed, though certain persons acted in the capacity of directors and secretary. A formal notice was sent to the bank by a person describing himself as secretary, that they were to pay the cheques signed by two out of three named directors and countersigned by the secretary in accordance with the alleged resolution, a copy of which was enclosed. The balance was almost entirely dissipated by cheques drawn in this way. The company was eventually wound up, and the liquidator sued the bank for the money paid away.

*Held:* There was no duty on the bank to inquire whether the directors and secretary had really been appointed.

It need hardly be said that the banker must be careful to act strictly in accordance with the terms of the authority as communicated to him.

The position of a banker discounting bills drawn or accepted by a trading company or otherwise dealing with such instruments whether on his own behalf or that of a customer is more difficult. Here it will not usually be practicable to require a sight of an authorisation to the particular director or manager whose signature is material to the instrument. The difficulties which arise in this connection, however, are not germane to the particular subject of discussion, viz. the customer's account, but rather to the general law of bills of exchange.

Non-trading corporations are like non-trading partnerships. They cannot draw, accept, endorse, or otherwise deal in negotiable securities or bills of exchange **Non-trading corporations**

[1] (1875) L.R. 7 H.L. 869.

unless authorised to do so by their memorandum or other instrument of incorporation. This has caused a doubt to be raised as to their ability to draw cheques.[1] There appears, however, to be no good reason why such a corporation should not deposit money with a banker, and if so its mandate to the banker must be effective as between itself and the banker whatever may be the position as regards holders. Whether such a corporation should be allowed an overdraft depends upon its powers of borrowing and for these the instrument of incorporation must be scrutinised.

## LOCAL AUTHORITIES

Local authorities

Various statutes and ministerial orders issued thereunder require local authorities, such as borough and district councils, to appoint a treasurer and work all their financial transactions through him. Thus "all payments to and out of the borough fund shall be made to and by the Treasurer" (Municipal Corporations Act, 1882, Sect. 18). Unless, therefore, the authority can appoint a banker as treasurer, it is not technically possible to have a bank account. In practice the Local Government Board (now the Minister of Health) long ago adopted the policy that no corporation should be appointed treasurer, and this out-of-date policy is still maintained. The difficulty is often surmounted by appointing a bank manager or other bank officer treasurer. But whether this is done, or some third party such as a paid official is appointed to the position, the treasurer will in practice operate by means of a bank account. Such account will normally be headed as account of A.B., Treasurer of such and such council, and it will accordingly be a trust account.

**ILLUSTRATION. RE GROSS, EX PARTE KINGSTON**[2]

A county treasurer had two accounts at a bank, one was headed Police Account. He later absconded, leaving his

[1] Chalmers, *op. cit.*, p. 75.

[2] (1871), 6 Ch. App. 632.

private account overdrawn and the police account in balance.

*Held:* That the bank was not entitled to set off. "If an account is in plain terms headed in such a way that a banker cannot fail to know it to be a trust account, the balance standing to the credit of that account will . . . belong to the trust."

Indeed such an account may for all practical purposes be regarded as the account of the authority itself, and in some cases the Courts have been prepared to hold on the evidence that the account was in fact that of the authority, the treasurer being in effect disregarded.

**ILLUSTRATION. HALIFAX UNION *v.* WHEELWRIGHT**[1]

The defendant manager of a bank was appointed treasurer to the plaintiffs, poor law guardians under the Poor Law Consolidation Order. Previously they had actually had their own account with the bank, but on the above Order coming into force, the account was transferred to the name of the manager. It continued to be treated as if it were the guardians' account and they were allowed interest upon it. A clerk employed by the guardians forged endorsements to orders drawn by them on the defendant and obtained payment at the bank. It was held that the account was in reality the plaintiffs' account and that the bank was protected by Sect. 60 of the Bills of Exchange Act, 1882, and that the manager was not personally liable, as in fact he had never really received the money, or if he had done so, he had kept it with the bank at the plaintiffs' order and they ought not therefore to have a claim against him which he could not himself have enforced against the bank.

In a very similar case, however, the opposite decision was come to.[2] The position cannot be regarded as satisfactory, for it means that in any particular case it may be difficult to say whether the relationship of banker and customer prevails.

The question of bank loans to local authorities is one of practical importance, and formerly also gave rise to legal difficulties, as it was sometimes not at all

[1] (1875), L.R. 10 Ex. 183, followed in *Colchester Union* v. *Moy* (1893), 68 L.T. 564.
[2] *Cosford Union* v. *Grimwade* (1892), 8 T.L.R. 775.

easy to ascertain what powers of borrowing were possessed by the authorities in question; the different types of authority possessing in this connection very diverse powers.

Under the Local Government Act, 1933,[1] however, temporary overdrafts for the purpose of defraying expenses pending the receipt of revenues, or for the meeting of expenses to be incurred pending the raising of an authorised loan may be incurred without the consent of any sanctioning authority. This statute does not, however, apply to the metropolis where the position is still controlled by the Local Authorities (Financial Provisions) Act, 1921.[2] Under this act the consent of the Minister of Health is required for the raising of temporary loans from a banker whether by overdraft or otherwise. The Minister may authorise the authority to charge its funds or revenues for the purpose of securing the loan.[3]

From a legal point of view, therefore, banks are now safe in allowing overdrafts to local authority customers, provided they are careful in the case of metropolitan boroughs and other corporations to see that the necessary consents have been obtained.[4]

## UNINCORPORATED ASSOCIATIONS

Accounts of Clubs, Societies, etc.

There are numerous associations of persons for objects of a non-commercial character which do not wish to incur the expense and trouble of incorporation, and which are not firms within the meaning of the Partnership Act, 1890. Typical examples of these are sports and social clubs, literary and scientific societies, and charitable institutions managing schools, hospitals, etc. Such associations are commonly managed by officers and committees elected from among the members, and these may control large funds which it

[1] 23 & 24 Geo. V, c. 51.
[2] 11 & 12 Geo. V, c. 67.
[3] The position in regard to long-term loans is somewhat different, but does not concern us here as banks will seldom lend on such terms.
[4] As to compliance with necessary conditions compare *R.* v. *Locke*, [1910] 2 K.B. 201.

is to their convenience to keep at a bank. This type of account is indeed quite common, and seems in practice to have given rise to but few legal difficulties, although the law on this type of association is not well ascertained. It is quite clear that the banker can deal with such an association only through its officers and committee—the association has no legal existence as such. He is entitled to assume that these persons are authorised to open the account and deal with the funds at their discretion. It would not appear that he could come under any liability to the individual member of the association except in the rare case when he assisted or connived at the wrongful use of the funds which had been placed with him, in which event he would be dealt with on the basis of trusteeship.

The banker must naturally carry out any instructions which he receives on the opening of the account, especially as to the authorisation to draw cheques. If the account is opened by the treasurer and no particular instructions are received, the banker is perhaps entitled to assume that that officer has full authority to draw cheques.

Difficulties are not indeed likely to arise until it comes to a question of advances. It is clear that the members of the association cannot be made liable for borrowings even if on their behalf except in so far as they individually assent to them. If the committee has authorised the overdraft, they would appear to become personally liable for its repayment.[1] If the treasurer overdraws upon his own responsibility, he makes no one liable but himself.

### ILLUSTRATION. COUTTS & CO. *v.* IRISH EXHIBITION IN LONDON[2]

Certain gentlemen were responsible for organising an exhibition in London, and formed themselves into an executive council. They authorised four of their number

[1] But see Paget, *op. cit.*, p. 12, who doubts this and recommends that an express undertaking to repay should in all cases be obtained. *Bradley Egg Farm* v. *Clifford and Others*, [1943] 2 All E.R. 378, however, supports the contention in the text.

[2] (1890) 7 T.L.R. 313.

to open an account with the plaintiff bank and to obtain an overdraft up to £10,000 for expenses. Afterwards a company was formed which had to be wound up. But the account was never transferred to it, and the plaintiffs eventually sued the members of the council. It was held that the defendants had become personally liable to the plaintiffs as their customers and must reimburse them the amount of the overdraft.

Trade unions

The trade union, although an unincorporated association, has an exceptional position in English law, since it can sue and be sued in its own name. An account can therefore be opened on behalf of a trade union, but whether it should be allowed an overdraft will depend on the terms of its constitution, and powers of borrowing.

## CHAPTER X

# OTHER SERVICES PERFORMED BY BANKERS

### I. GENERAL CONSIDERATIONS

The banker's obligations

As an ancillary to their main business, bankers have for many years rendered valuable services to their customers of various kinds. It is questionable how far these services are legally speaking to be regarded as banking business. Most of the functions in question, however, are performed by the banks every day, and without any question whether they are under any obligation to do so. There is little, if any, modern authority as to whether it is impliedly part of the banker's contractual undertaking that he will render such services. Could a banker properly refuse to accept his customer's valuables for safe custody, to act as a reference as to his financial position, or to furnish him with a letter of credit for use on a foreign tour? It is no answer to these questions to say that no banker is likely to refuse such facilities. The question of whether such services are part of the business facilities which the banker offers to a person who wishes to open an account with him and become his customer or whether he affords them gratuitously as a matter of grace is of considerable practical importance, because upon the answer to it depends the standard of care which the banker must display in the rendering of them. It will not be a question of the banker having refused to perform a duty but, in the majority of cases where dispute arises, of his having been negligent, i.e. of his having failed to exercise a proper degree of care in the circumstances. A person who performs a service gratuitously is under a slighter obligation to take care than is a person who does so for reward, i.e. who is bound by a contract. The one is said to be liable only for gross negligence, the other only for ordinary negligence. This subject has been discussed principally in

connection with the law of bailments and will be further examined in the section on Safe Custody.

It is quite possible that the answers to the question vary from one type of service to another. No doubt each of them was in the first place only rendered incidentally and gratuitously, and there are decisions as to some of them which are to this effect. In 1868[1] it was certainly the view of the Privy Council that safe custody of valuables was gratuitous. In 1918[2] a member of the same tribunal expressed the view that "it would be difficult to establish that advising on investments was part of the business of banking." These cases have not been expressly departed from, yet with the passage of time it may well be that the situation has changed, and that it has now become a part of the contract between banker and customer that such services should be rendered. This appears to be a question of fact rather than law, and one on which it would be difficult to express an unhesitating opinion without a careful consideration of evidence as to actual practice.

## II. SAFE CUSTODY OF VALUABLES

It is in regard to safe custody that this question of whether the service is rendered as a matter of contractual obligation has been most discussed.[3] Bankers have rendered this service for a very long time. Indeed, in this country, it is as old as banking itself, for as we have seen, it was with the deposit of gold and valuables with the goldsmiths during the troubled times of the Parliamentary wars that the English system of banking arose. It must nevertheless be still regarded as open to question whether the provision of this service is part of the business of banking or is merely ancillary. Whether this be right or not, the very cases which have been decided on the assumption of the banker's gratuitous position go to show that his obligation as to safe custody is of such a strict character that it

[1] *Giblin* v. *McMullen* (1868), L.R. 2 P.C. 317.
[2] *Banbury* v. *The Bank of Montreal*, [1918] A.C. 626.
[3] See particularly Paget, *op. cit.*, p. 74.

could hardly be higher if he is to be treated as a bailee for reward. Before discussing these cases, however, it is necessary to say a few words on the general subject of bailment.

Bailments

Deposit for safe custody is a branch of the law of bailments. A bailment is the delivery of moveable property by one person (the bailor) to another (the bailee) on condition that it shall be in due course redelivered to the bailor or to his order. An ordinary commercial bailment is contractual, but voluntary bailments (i.e. where there is no consideration) are technically not contractual.

For practical purposes, the most important question which arises in connection with bailments relates to the standard of care which the bailee must observe in relation to the property while in his custody. If goods are lost or damaged or destroyed while in a bailee's charge, is he responsible to his bailor? The answer is that an ordinary or common bailee for safe custody is not responsible for such loss unless it can be proved that this was caused by some negligence on his part, or unless he deliver to a third party without his customer's authorization.

The latter of these two possibilities can be dismissed quickly. A person who wrongly disposes of another's goods or documents of title so as to deprive him of possession is guilty of conversion and liable to pay the value to the owner as compensation. It is immaterial that the wrongful conversion was made *bona fide* and without negligence.[1] A banker who is asked to redeliver valuables, deposited with him for safe custody, to any person other than the depositor himself must satisfy himself fully as to that person's credentials before handing the goods or documents to him. If necessary, the banker may reassure himself by reference to the customer personally. It has been suggested that such action which might involve a refusal for the time being to make delivery to a person who is actually entitled to receive the property would amount

Delivering up valuables

[1] Cf. *Hollins* v. *Fowler* (1874), L.R. 7 H.L. 757.

technically to conversion. It has been said, however, that "a refusal to deliver up goods to the owner on the ground that the holder must have time to ascertain whether he is the owner, is no conversion."[1]

**ILLUSTRATION. LANGTRY *v.* UNION BANK OF LONDON**[2]

The plaintiff deposited very valuable jewellery for safe custody with the defendant bank. A fraudulent person stole a piece of her note-paper and on it forged a request to the bank to hand the jewels over to the bearer, and to this he appended a forged signature in the name of the plaintiff. The forgery was executed with such skill that it deceived the officials of the bank who handed the jewels over to the thief. The plaintiff thereupon sued the bank for the value of the jewellery. This action was compromised, but it was understood that the bank paid a large sum of money to the plaintiff in order to effect a compromise.

Negligence

Returning to the former question, viz. that of standard of care, we find that this involves the difficult topic of negligence which may be defined for our purposes as absence of care in the circumstances. It is not, however, possible to tell whether a particular bailee has been careless without knowing what degree of care, what standard, was properly to be expected of him. This naturally varies according to whether he is looking after the goods as part of his business, i.e. for reward, or as a mere gratuitous service which he may provide or withhold as he chooses. Exactly how wide is the practical difference between these two standards is a very puzzling question. As has already been noted, a gratuitous bailee is liable only for gross negligence, while a bailee for reward is liable for ordinary negligence. This, however, is not of really great assistance, for what may be ordinary negligence in one set of circumstances may be gross negligence in another. In *Giblin* v. *McMullen*[3] the standard of care which a gratuitous bailee must take was said to be that which a reasonably prudent man takes of his own

[1] *Robarts* v. *Tucker* (1851), 16 Q.B. 560; see also Paget, *op. cit.*, pp. 81–5 where the procedure suggested is abundantly justified.
[2] (1896), *Journal of Institute of Bankers*, Vol. 17, p. 338.
[3] *Supra.*

property of a like description. Accepting this as the lowest standard of care for which a banker is answerable, it clearly puts upon such a bailee a very high degree of responsibility, since a banker is a person who for his own purposes requires strong safes and an organisation of his business well calculated to protect against fraud and theft.

A bailee for reward, on the other hand, is said to be responsible for taking reasonable care according to the facilities at his disposal, or if his business is that of a bailee, according to that standard which could be reasonably expected of a person in that way of business.[1] The facilities which banks offer for this kind of business are just those of the ordinary safes and strong-rooms of a bank, and of taking reasonable precautions to employ respectable and honest servants, and against fraud and theft. It would appear therefore that in the case of banker bailees there is little if any practical difference between the standard of care which will be required of them whether they are in fact bailees for reward or only gratuitous bailees.

This question whether the banker who receives his customer's valuables for safe custody is a gratuitous bailee or a bailee for reward has given rise to much discussion. In view of what has been said, it appears to the writer to be largely academic. Authority can be found in several early cases in favour of the "gratuitous" view,[2] but on examination it will be found that this was assumed to be correct without serious argument. Since that time the practice of accepting valuables for safe custody has become so general that it appears to the writer that it is a service which the banker impliedly agrees to provide when the account is opened and which the customer expects to receive. If this be so the banker is now a bailee for

[1] "The tendency of modern decisions, however, is to ignore traditional distinctions, and to take the objective test of the conduct of a reasonable man in the particular circumstances of the bailment in question." Goodeve, *Modern Law of Personal Property*, 7th Ed., p. 32.

[2] Cf. *Giblin* v. *McMullen*, *supra*.

reward, a view which appears to be taken by Hart, who says that "the care which the banker is bound to take is such care as an ordinarily efficient and prudent banker would take in similar circumstances." The contrary opinion strongly argued by Paget,[1] viz. that the banker's "obligation is to put himself in a position to take the highest care possible and to adopt all precautions and means of ensuring safety known to contemporary science" is based on a fallacious view of the standard of care demanded of a bailee for reward. The extreme degree of care suggested by Paget could only be required of a bailee of an exceptional type, such as a common carrier or possibly a safe deposit company. The banker's obligation is merely to provide such safes and appliances as are usually kept at banks, and to be careful in his business arrangements.

The position will perhaps be best made clear by looking at one or two decided cases.

### ILLUSTRATION 1. GIBLIN *v.* McMULLEN[2]

A customer left a box containing railway debentures with his bank for safe custody. It was placed in the strong-room of the bank, which could only be entered through a room in which a cashier sat by day and a messenger slept by night. This strong-room had two iron doors, which were opened by separate keys, both of which were by day in the charge of the cashier and by night one of which was entrusted to the cashier and the other to another officer of the bank. The cashier made use of his key to abstract the debentures from the box and to convert them to his own use. It was held that the bank had not been guilty of negligence, but it may be doubted whether the decision would be the same at the present time.

### ILLUSTRATION 2. RE UNITED SERVICE CO.[3]

The owner of railway shares deposited the certificates with his bank where they were kept in a safe to which the manager had the only key and uncontrolled access. The bank collected the dividends and received a commission thereon: they were accordingly bailees for reward. The manager purloined the certificates and converted them to

[1] *Op. cit.*, p. 75.
[2] (1868), L.R. 2 P.C. 317.
[3] (1870), 6 Ch. App. 212.

his own use. The system under which the manager was enabled to commit this crime was held to show culpable negligence in the bank for which they were liable.

It is, of course, the duty of the bank to exercise care in the choice of its servants and to make reasonable inquiries as to their previous history before engaging them. Subject to this, a banker is not liable for the thefts of a servant. In the case mentioned of *Re United Service Co.* it was not for the dishonesty of the manager that the bank was held liable, but for the careless system which had enabled him to perpetrate his frauds. At the present time it is the invariable practice to have two different keys for the strong-room, each of which is entrusted to a different official so that the room can only be opened when both are present.

Acknowledgment of receipt

As has been mentioned already, it is usual for the banker either to give a receipt for the valuables or to require the customer to sign an entry in one of the bank books acknowledging the deposit of them. Should such a receipt contain a schedule of the goods, it will be *prima facie* evidence that these goods were in fact received by the bank. Usually, however, the valuables will be contained in a box, and the receipt will acknowledge the box "contents unknown." In such a case the burden of proving exactly what goods were deposited and their value is thrown on the customer. The receipt usually provides that it must be presented at the bank before redelivery of the goods will be made, but it is questionable how far the banker is entitled to insist on this provision.

Where valuables are to be kept

It has been suggested that the bank is under the obligation to keep the goods at the particular branch at which they are received. There is no authority on this point. If such a duty exists, it must be derived from an implied agreement between the parties, and it is possible to contend with some show of reason that the customer's valuables are intended to be kept at the branch which has his account. Until this question has been settled by a legal decision, it would be advisable for bankers to obtain the express permission of

a customer before moving his property to a branch other than that at which it is deposited. For if the duty is as suggested, the bank will be absolutely liable for any loss or damage which may befall the goods after they have been removed, whether due to negligence or not.[1]

## III. BANKER'S REFERENCES

The giving of information as to the financial position of their customers, which is commonly called a bank reference, is part of the everyday business of banking. It is to be feared that this is sometimes done without the knowledge or consent of the customer, and if so it would appear to be a breach of the duty which the banker owes to his customer of treating the account as confidential.[2]

Apart from those cases where the law permits such disclosure, it is obviously justifiable where the customer himself requests that it should be made, as he does by implication when he gives his banker as a "reference."[3]

**Extent of banker's liability**

In this event the position of the banker *vis-à-vis* the customer can be dealt with shortly. He must take due care not to furnish information which is false. If as a result of the breach of this duty the customer suffers damage, the banker will have to compensate him. In actual fact, of course, a customer is unlikely to suffer damage unless the information given is detrimental to him, so that the banker will probably err, if he err at all, on the side of being unduly favourable to the customer.

If as a result of such unduly favourable information the inquiring party is led to take up business which he would not have otherwise accepted and thereby suffers loss, the question will inevitably arise whether he is entitled to compensation from the banker. An analysis of the legal position, however, shows that his chance of success is small.

[1] Cf. *Lilley* v. *Doubleday* (1881), 7 Q.B.D. 501.

[2] See Chapter III above.

[3] Strictly speaking, the banker in such a case is a referee, i.e. a person to whom reference may be made for information. Colloquially, however, the word "reference" is commonly used.

(1) There is clearly no contractual relationship between the banker and the person to whom he gives the information, and therefore there is no contractual duty to make a truthful statement. This means in effect that no action will lie against the banker for negligently making a false statement, and it will very seldom happen in practice that the inaccuracy is due to anything more serious than negligence.

(2) There remains the possibility of an action in tort. As Lord Haldane said in *Banbury* v. *Bank of Montreal*,[1] the only duty on the banker in such a case is that "of common honesty," which in more precise language means that he must not be fraudulent. Any misrepresentation as to the customer's financial position which has been made innocently will not be actionable. In practice the chance of fraudulent misrepresentation is slight but, even if there be fraud, no action will lie on a false and fraudulent representation as to the character, conduct, credit, ability, trade or dealings of any person unless it be made in writing,[2] and in the case of a company if the writing be under the company's seal.[3] Even if the reference be given in writing, it will be a difficult question whether the bank is liable for the fraudulent conduct of their servant the bank manager who will, probably, have been responsible for giving the reference. The words of the Act require that the writing should be "signed by the party to be charged" and therefore it seems that the bank could not be made liable.[4] The manager himself will, of course, be personally liable for his own fraudulent conduct, but only if his statement was signed, and if fraud can be proved against him.[5] Actions against individual bank officers are very unusual, however; the reason is presumably to be found in the fact that the

[1] [1918] A.C. 626.

[2] Statute of Frauds Amendment Act, 1828, 9 Geo. IV, c. 14, s. 6.

[3] *Swift* v. *Jewsbury* (1874), L.R. 9 Q.B. 301.

[4] See *Banbury* v. *Bank of Montreal, supra*, where this matter was much discussed and there was considerable difference of opinion among the members of the Court.

[5] *Swift* v. *Jewsbury* (1874), L.R. 9 Q.B. 301; *Parsons* v. *Barclays & Co and Goddard* (1910), 26 T.L.R. 628.

officer in question may often not be sufficiently substantial to justify proceedings.

## IV. BANKER'S CREDITS

General

At the present time perhaps the most important ancillary service rendered by a banker to his commercial customer is the furnishing of credit which will enable the customer to discharge his obligations. This may or may not entail an advance or loan to the customer; the main feature of it, however, is that the banker through his business connections is able to place the machinery of international commercial banking at his customer's disposal.

The principal machinery by means of which this service is rendered to the customer is the letter of credit. This important instrument is of great antiquity, older indeed than modern banking. A customer could be furnished with a letter of credit to meet his personal requirements when abroad or to satisfy his business commitments, e.g. to provide the price of commodities purchased abroad. These two situations, however, are susceptible of different treatment and a divergence between the instruments used grew up. The original letter of credit was essentially a document which the customer carried with him. The commercial letter of credit has become something which can be sent to the customer's creditor to satisfy him that the debt will in due course be discharged. In the beginning it commonly took the form of an intimation by the banker that he would accept bills of exchange up to a specified amount and subject to given conditions. It became usual to set out the form of the bill, which was to be drawn, in the margin of the letter of credit, hence the term "marginal letter of credit." This type was in general use during the nineteenth century more particularly in Eastern markets. Much difficult litigation arose in connection with these instruments.[1]

[1] See *Maitland* v. *Chartered Bank of India* (1869), 38 L.J.Ch. 363; *Re Barber & Co., Ex parte Agra Bank* (1870), L.R. 9 Eq. 725; *Re Agra and Masterman's Bank* (1867), 2 Ch. App. 391.

In modern times a somewhat different machinery has been evolved in the documentary credit which in its various forms is now in general use, and which it is proposed to discuss in detail in this section. It seems hardly necessary, however, to refer further to the marginal type. Meanwhile, of course, the personal letter of credit remains in use and has played its part in the development of tourist traffic, though here also there are more modern varieties in the form of circular notes and travellers' cheques.

**Letters of credit, circular notes and travellers' cheques**

A person travelling abroad will usually wish to be in a position to obtain cash in the various towns which he visits. In order to do this he may obtain from his banker a letter of credit addressed either to one particular agent of the banker or to his agents generally in the various towns in the countries to be visited. Such agents are usually referred to as correspondents. The former type is called a "specially advised" letter and the latter a "circular letter,"[1] which is the more usual type though the former is more often used for issues in foreign currency. Such a letter of credit authorises the banker's correspondents to pay to the holder a sum or sums up to an amount indicated in the letter. Suppose the letter is for £1000, the customer may obtain the whole amount from one correspondent or draw for smaller sums from the different correspondents until he has had the whole amount. As he receives the payments, the various sums will be endorsed in the letter, and after the whole amount has been paid the credit is said to be exhausted.

As a safeguard against fraud, the customer is in addition furnished with a letter of indication which bears his own signature authenticated by his bank. When he desires to obtain cash, he presents the two letters to his banker's correspondent who will require him to sign a draft for the amount he requires and will compare the signature thereon with that on the letter of indication. It is naturally important that the letter of credit and the letter of indication should be kept

[1] For an example, see Appendix II.

apart, as a thief who had obtained both might be able to secure payment of the whole unexhausted credit without difficulty. It is usually therefore made a condition of the contract that this shall be done.

Circular Notes

Circular Notes are based on the same principle. Here, instead of a letter, the customer is furnished with a draft, which he can fill in up to a specified sum, or in the more modern practice with a number of notes or cheques, each for a definite amount in round figures in sterling such as £5, £10, £20 and drawn by the banker upon his foreign correspondents. These are the so-called travellers' cheques. Circular notes proper have largely been displaced by travellers' cheques; the former have the additional safeguard of a letter of indication.[1] It is usually a condition of the issue of the notes that they shall be kept apart from the letter of indication. If this is not done and they are both stolen by a thief who forges the customer's signature and obtains payment of the note, the banker is entitled to debit his customer's account.[2] On the other hand, it would not appear that the banker is under any legal obligation by English law to reimburse the correspondent who has paid such a note, because he has not in fact carried out his mandate which was to pay the customer.[3]

Travellers' cheques

A letter of credit is not a negotiable instrument nor is a circular note until it has been properly filled in, signed, and delivered. Even so, it may not be negotiable owing to some defect in form such as lack of certainty.[4]

The issue of letters of credit or of this type of circular

[1] The custom as to this apparently varies; see Minty, *Law of Banking and Foreign Exchange*, 2nd Ed., p. 283.

[2] See *Hume-Dick* v. *Herries Farquhar & Co.* (1888), 4 T.L.R. 541.

[3] See the dicta in *Conflans Stone Quarry Co.* v. *Parker* (1867), L.R. 3 C.P. 1, a case where the character of circular notes was discussed.

[4] As regards circular notes, Chalmers (*op. cit.*, p. 377) expresses a contrary opinion, and Hart (*op. cit.*, p. 661) accepts this; but see Paget, *op. cit.*, p. 146, where he takes the point that on the wording usually adopted, viz. "Pay to the order of the person named in . . ." the letter of indication the payee is not sufficiently clearly indicated.

notes is not the equivalent of the purchase of so much credit by the customer; i.e. he is entitled to return it or such portion of it as remains unexhausted to the bank and receive credit therefor. It is usually a condition of his doing so that he should return the letter of indication at the same time. The return of the letter of indication alone is not, however, at any rate in the case of circular notes,[1] sufficient because the correspondent is quite entitled to cash the notes without receiving the letter of indication which is issued only as a safeguard. Until the notes are returned, therefore, the banker cannot know whether they have not been issued in proper form. The customer accordingly cannot claim to be credited with the amount of the unused notes except perhaps on giving his banker an indemnity against the possibility of having to reimburse his correspondent.

**ILLUSTRATION. CONFLANS STONE QUARRY CO. v. PARKER[2]**

The plaintiffs obtained a circular letter of credit from the defendant together with a letter of indication. The letter of credit did not make the negotiation of the draft which was attached to it conditional on the production of the letter of indication. These were sent to the plaintiff's Paris office under separate cover. The letter of indication came to hand but that containing the letter of credit was lost. The plaintiffs brought this action to recover its value. It was held that they were not entitled to do so without tendering the letter as this might be paid by their correspondent who would then be entitled to reimbursement by the defendant.

The position of the banker's correspondent is simply that of an agent.[3] The customer has no right of redress against him if he refuses to honour the letter of credit or gives him the money at a wrong rate of exchange. As between banker and correspondent, the ordinary rules of agency law apply. In the days before the consolidation of banking in this country into a few large concerns, all the country banks had their London

[1] This however will depend on the terms of the notes.
[2] (1867), L.R. 3 C.P. 1.
[3] See Ch. XIII.

correspondents and difficult questions used to arise when customers came to London and entered into more or less direct relationship with the correspondent. Such questions have become rare and do not call for discussion. There is obviously the possibility of difficult problems arising between the banker and his foreign correspondent, but in practice these have not come before the Courts. The correspondent might insist on having an indemnity, but in practice he usually accepts the risk.

## COMMERCIAL CREDITS

Commercial credits

The necessity for commercial credits arises in this way: an importer of goods from abroad will probably have to satisfy the exporter that they will be paid for. Payment for these shipments from abroad is usually made by acceptance of drafts, but the shipper needs some sort of assurance that these will be paid at maturity. This can be given by the knowledge that the buyer's bank will shoulder responsibility, and this knowledge is obtained by the intimation to the seller, either directly or indirectly, by the bank that the buyer has credit at the bank for the amount of the price. At the same time the means which are to be followed to make this money available, e.g. the negotiation of drafts drawn on the buyer accompanied by documents of title to goods, will be indicated.

D/A and D/P. credits

The evolution of this method of finance is interesting. Though not met with in its modern form until recent times, credits given against documents have been granted from a comparatively early period. The most obvious method is for the seller's banker to accommodate the seller by advancing the price against the documents. This type of finance is commonly met with in the export trade, particularly where financial arrangements at the buyer's end are unsatisfactory. The arrangement is that the bank discounts the customer's draft for him and takes as security the bill of lading or other documents of title for the goods which it duly presents through its correspondent to

the buyer or his banker, who either pays the price (in which case the documents are marked D/P) or gives his acceptance (D/A).[1] Term bills may be drawn either D/A or D/P. The bank accepts no responsibility to the buyer for the genuineness of the documents which it takes up[2] or for any breach of contract by its customer.[3] These rules appear to apply generally in all cases where bankers take up documents under letters of credit.

The D/A type of credit which is most likely to be called for is unsatisfactory, however, because it involves the surrender of the documents. So that if the buyer becomes insolvent, the bank is thrown back upon its customer's liability and he also may prove to be insolvent. It is more satisfactory that the credit should be advanced to the buyer rather than to the seller, for the buyer's bank will be in the position to control the documents at much later stages in the transaction. Hence the modern form of documentary credit. This is so called because it provides at the same time for credit to the customer and security to the banker, in the form of the deposit with him of the documents of title to the goods for which the customer is paying by means of the credit. Most overseas trade is now transacted on the basis of the tender of documents of title, usually bills of lading, and as a rule on that type of contract known as c.i.f.[4] Modern form

The modern merchant does not rely upon his own capital for the price of his purchases. He is concerned

[1] A very unsatisfactory variant of this method is exemplified by *Ladenburg & Co.* v. *Goodwin*, [1912] 3 K.B. 275, where the bank simply received copies of the shipping documents together with a letter hypothecating the goods to the banker (for an explanation of this term, see p. 241). The property in the goods having passed to the buyer under the contract of sale, it was held that the bank had only an equitable charge on the price and that this should have been registered under the Companies Act, 1908, s. 93 (now s. 79, Companies Act, 1929). As it had not been registered, it was held to be void.

[2] E.g. if they turn out to be forged as in *Guaranty Trust Company* v. *Hannay*, [1918] 2 K.B. 623.

[3] Cf. *National Park Bank* v. *Berggren* (1914), 30 T.L.R. 387.

[4] Nobody having to do with overseas trade can afford to be ignorant of the law relating to c.i.f. contracts, least of all bankers providing credits for the importation of goods. The student is advised to consult *Goitein on C.i.f. Contracts* (Pitman), 2nd Ed.

to tide himself over the period between the buying of goods and the making of subsales. Unless his credit is exceptionally good, he will have to have recourse to his banker for this finance. The latter will require security, and this is conveniently afforded in the shape of documents of title to the goods.[1] A banker's commercial credit might accordingly be described as the crankshaft of modern commerce.[2]

**Procedure under documentary credit**

The procedure used for a documentary letter of credit varies somewhat from case to case. In the first place, however, the terms of the credit must be arranged between the banker and his customer, the buyer. It is important that these should be clear, although if there is an ambiguity and the banker reasonably follows a course which turns out to be contrary to his customer's wishes the rule in *Ireland* v. *Livingstone*[3] will protect him. In order that there may be no difficulty, however, the bank will usually furnish the customer with a printed form of application for the issue of the credit, and it is desirable that this form should be used in all cases as it will have been carefully drafted. Having obtained his instructions, the banker must follow them precisely, for if he fails to do so he will have no right to debit his customer with any sums which he may pay away under the credit. As Professor Gutteridge says:[4] "It is the duty of the banker to scrutinise the documents tendered to him by the beneficiary under the credit and to check them carefully with the instructions which he has received from his customer. Any default in this respect will debar the banker from claiming reimbursement by the customer of any amount which may be paid against the documents, and will also cause him to forfeit his right to remuneration."

**ILLUSTRATION. SCOTT *v.* BARCLAYS BANK**[5]

The defendant bank was instructed to open a credit under which drafts were to be honoured against documents

[1] For the fuller discussion of documents of title as a banker's security, see Chapter XI.

[2] See *The Law of Bankers' Commercial Credits*, by H. C. Gutteridge, K.C.

[3] See p. 74, *ante*.

[4] *Op. cit.*, p. 55.

[5] [1923] 2 K.B.1

including "an approved insurance policy." The documents which were tendered included a certificate by an American insurance company to the effect that a policy had been issued, but giving no details as to its terms. The bank rejected this certificate as being a bad tender, and it was held that they were entitled to do so. Had they accepted it their customer would have been entitled to have refused to pay.[1]

Under the law of sale it is a condition of a contract of sale that goods sold by description must answer to the description.[2] It is particularly important, therefore, that the description of the goods in any bill of lading or other document of title presented to the bank under the terms of the credit, should correspond with the description of the goods contained in the letter of credit. "The accepting bank can only claim indemnity if the conditions on which it is authorised to accept are in the matter of the accompanying documents, strictly observed. There is no room for documents that are almost the same, or which will do just as well."[3]

**ILLUSTRATION. J. H. RAYNER & CO., LTD. v. HAMBRO'S BANK, LTD.**[4]

The letter of credit issued by the defendant bank in favour of the plaintiffs covered a shipment of "1400 tons Coromandel ground nuts." The bill of lading presented to the bank described the goods as "machine shelled ground nut kernels . . . country of origin British India." The bank refused to take up the documents.

*Held:* They were entitled to do so. Even if by the usage of the produce market the bill of lading would have been a good tender to the buyer the bank could not be expected to know this.

The next step is for the banker to advise the seller of the opening of the credit; this may be done directly **Contents of letter of credit**

[1] Compare also *National Bank of South Africa* v. *Banca Italiana di Sconto and Arnhold Bros. & Co.* (1922), 10 Ll.L.R. 531, where the credit called for acceptance against delivery orders, and it was held that the bank was justified in refusing the tender of the bill of lading.

[2] Sale of Goods Act, 1893, s. 13.

[3] Per Lord Sumner in *Equitable Trust Co. of New York* v. *Dawson Partners, Ltd.* (1926), 27 Ll.L.Rep., at p. 52.

[4] [1942], 59 T.L.R. 51.

by a letter notifying the seller, or through the intermediary of the banker's correspondent in the seller's country or even by giving to the buyer himself a letter which he may send to the seller.[1] Whichever method be adopted, the advice takes the form of a letter which sets out the terms of the credit and deals with the following among other matters: (*a*) the amount of the credit; (*b*) how it is to be operated—this may be by the drawing of bills of exchange for acceptance by the banker, but the letter must state at what period from sight such bills are to be paid or otherwise deal with the maturity of the bills. A date beyond which the credit will not be effective will also be stated; (*c*) the documents which must be tendered with the bill of exchange when it is presented for acceptance will then be set out and will commonly include invoice, bill of lading, and policy of insurance, which are the typical documents under a c.i.f. contract, possibly in addition such other documents as a certificate of origin or a consular certificate. If the sale has been made on c.i.f. terms, it is particularly important for the banker to make sure that the bill of lading is in the form "shipped" and not "received for shipment," and that he gets a proper policy of insurance and not simply a certificate that the goods are insured under some floating policy. There is still a controversy over these matters which cannot be discussed here, but the general opinion seems to favour the view expressed above, so that the banker cannot safely accept tender of a "received for shipment" bill of lading or a certificate of insurance unless his customer has instructed him to do so, or possibly where there is a well-established custom of the particular branch of trade which is in question to accept such documents as good tender under c.i.f. contracts.[2] (*d*) The type of cargo, price, ports of shipment and discharge, and period within which shipment has to be made will also be stated.

[1] See precedent in Appendix II.

[2] See per McCardie, J., in *Diamond Alkali Co.* v. *Bourgeois*, [1921] 3 K.B. 443; Gutteridge, *op. cit.*, Ch. V; Goitein, *op. cit.*, pp. 44–7.

Having received this letter, the seller can safely ship his cargo provided he observes the conditions on which it is granted, and, having done so, he will have no difficulty in discounting with his own bank the drafts which he draws on the buyer's bank for the price of his goods.

Presentment of documents

It remains to consider the position which arises when the documents are presented to the banker issuing the credit. According to the terms of the agreement between himself and his customer, the banker will either pay cash (cash credit) or accept a draft drawn by the seller (credit under acceptance). In either event, the banker will be careful before paying or giving his acceptance to make sure that the documents are in order.[1]

Handling of goods

Assuming that the documents are in order and are taken up by the banker, the next question is how to enable the importing customer to handle the goods. He will, as a rule, desire to sell them off in parcels, but they cannot be obtained and delivered to sub-purchasers so long as the bank retains the documents. Moreover, the customer cannot obtain the funds to reimburse the banker against his payment or acceptance made or given on his behalf until he has obtained payment from his own purchasers, and these will not pay until after they have received the goods. This difficulty may be got over by the issue of delivery orders on the warehouse where the goods have been placed issued by the bank to the purchasers against payment by the latter. This, however, involves the bank taking a somewhat active part in the transaction and is disliked by customers. Where the customer is entirely trustworthy, it is usual for the bank to hand over to him the documents of title so as to enable him to obtain possession of the goods and to dispose of them in the ordinary way of business. It does not thereby cease to be pledgee.

**ILLUSTRATION. OFFICIAL ASSIGNEE OF MADRAS *v.* MERCANTILE BANK OF INDIA**[2]

A railway receipt, which in India is a document of title to

[1] See p. 212, *ante*. [2] [1935] A.C. 53.

goods, was pledged by merchants with bankers as security for a loan. The bank afterwards handed the document back to the pledgor in order to enable him to collect the goods, and place them in a warehouse on the bank's behalf. The pledgee afterwards became bankrupt, and his assignee claimed the goods from the warehouse.

*Held* (by the Privy Council): That the bank had not, by handing the receipt over to the pledgor, given up their pledge, and that as the assignee in bankruptcy took over no more than the pledgor's title, the bank were entitled to realise their security as against him.

In this event, however, the customer gives to the bank a form of receipt known as a "trust receipt" by which he undertakes to hold the documents and eventually the proceeds of sale in trust for the bank.[1]

This procedure clearly requires that the bank should repose confidence in the customer, since, if the latter is fraudulently minded, he is put in a position to dispose of the goods and pocket the proceeds, while the *bona fide* purchaser takes the goods free of claims by the bank. It is not unusual, therefore, for the banker to safeguard his position by obtaining at the outset from the customer a general letter of hypothecation,[2] by which all the customer's property which is or may at any time be in the possession of the bank becomes pledged as a continuing security for money due or which may become due from the customer to the banker.

Documentary letters of credit fall into two divisions—

(1) Unconfirmed or revocable letters; and

(2) confirmed or irrevocable letters.

Unconfirmed credits

These terms to some extent explain themselves. An unconfirmed credit is one which can be revoked at any time before the drafts drawn under it have actually been accepted, i.e. the seller on presenting documents and draft is liable to be met with a refusal on the part of the bank to take up the documents or accept the draft, although in practice it is the custom of the

[1] As to this, see p. 240 and Appendix II, p. 336.

[2] As to the meaning of this term, see p. 241.

banks to notify sellers as soon as such credits are withdrawn. Payments by agents made before advice of cancellation has reached them must be honoured by issuing banks.

**ILLUSTRATION. CAPE ASBESTOS CO. v. LLOYDS BANK**[1]

S. & F., of Warsaw, desired to buy from the plaintiffs some asbestos sheets. They instructed Lloyds Bank to open a credit in their favour. On 14th June, 1920, the bank wrote to the plaintiffs informing them that a credit for £1620 had been opened in their favour and could be made available by sight drafts accompanied by an invoice for the goods. The letter concluded "This is merely an advice of the opening of the credit and is not a confirmation of the same." On 20th of July, 1920, the plaintiffs shipped part of their goods and the draft was accepted. On the 4th of August the defendants were instructed by their customers to withdraw the credit, but they failed to inform the plaintiffs of this although they admitted that it was their practice to do so. On the 30th of September the plaintiffs shipped the remainder of the goods and thereafter presented their draft with documents attached. The defendants refused to accept it and it was held that they were entitled to do so in view of the fact that the credit was unconfirmed.

In the case of unconfirmed credits, the right of cancellation usually appears in express terms at the foot of the letter, but though the contrary opinion has been advanced, this does not appear to be essential.

It is obvious that an unconfirmed credit is from the seller's point of view a very unsatisfactory method of finance; as was said by Bailhache, J., "an unconfirmed credit is practically worthless."[2] Should he become involved in any dispute with his buyer or even if it becomes inconvenient to the latter to pay, e.g. owing to a fall in prices, the banker may receive instructions to refuse the seller's drafts. Again, should the buyer become insolvent, his banker will naturally refuse to accept the drafts, and the seller who may have shipped the goods will be unable to obtain payment of the price. This type of credit has indeed been largely superseded by the confirmed or irrevocable credit.

[1] [1921] W.N. 274. [2] See case just illustrated.

Confirmed credits

A confirmed credit is considered as irrevocable by the banker,[1] i.e. he cannot withdraw it without the consent of the beneficiary even if his customer the buyer requires him to do so.

**ILLUSTRATION. URQUHART LINDSAY *v.* EASTERN BANK[2]**

The plaintiffs sold certain machinery to B. J. M. to be shipped to Calcutta. The buyers opened "a confirmed and irrevocable credit" in favour of the plaintiffs with the defendant bank. The contract of sale contained a term providing that in certain events the price payable for the machinery should be altered. After two shipments had been made, and paid for under the credit, a dispute arose as to whether the price of a third shipment should not be altered, and the buyers instructed the defendants not to take up the documents or honour the plaintiff's drafts. These instructions were carried out, but it was held that the defendants could not lawfully revoke the credit, and they were therefore liable to pay damages to the plaintiffs.

It is as yet, however, far from clear as to when the irrevocability of a confirmed credit arises. A well-known bank informs its customers that "once a confirmed credit is opened and advised to the beneficiary it cannot be cancelled before the expiry date," and this is the commonly held opinion. It is assumed that "advise to the beneficiary" means actually bring to his notice and that a letter of credit advised in writing could be effectively cancelled by cable at any time before it reached the beneficiary. In the absence of authority, it must indeed be considered doubtful in law whether the credit becomes irrevocable by the mere receipt of the letter though, as will be shown, the contract between seller and buyer may perhaps ensure irrevocability at this stage. If the letter of credit is to be regarded as an offer of a contract made by the banker to the beneficiary, and the inclination of our Courts seems to be to adopt this view, there can be no

[1] The words "confirmed" and "irrevocable" used in this connection are usually considered by lawyers to mean the same thing: see the Gilbart Lecture for 1936 by C. T. Le Quesne, K.C. (*Journal of the Institute of Bankers*, Vol. 57, p. 159). See also Gutteridge, *op. cit.*, 36. Bankers do not agree; see a note at *ibid.*, p. 297. The position is otherwise in the U.S.A.

[2] [1922] 1 K.B. 318.

binding contract until it is accepted.[1] This, however, is clearly a case where the offeror expects an acceptance by conduct, and does not look for any communication of the fact of acceptance. What then is to be regarded as an acceptance for this purpose? It would appear to be constituted by any act on the part of the beneficiary which is taken on the basis of the credit, such as the shipment of goods; or possibly indeed any event which brings him under a legal obligation to the banker's customer, i.e. the buyer. If, as may be the case, the contract of sale is made subject to the receipt by the seller of a letter of credit from the buyer's banker, the mere receipt of the letter would perhaps effect a binding contract of sale and the credit might be held irrevocable as from that time.[2]

It is clear that the banker under a confirmed credit is not justified in a refusal to accept drafts drawn under it by the fact that the beneficiary has been guilty of a breach of contract towards his customer.[3] Indeed nothing except a failure to comply with some term of the letter of credit would appear to excuse such a course.

The holders of the bank's acceptances given under the letter of credit have no rights over against the documents held by the bank as security even though these drafts are on their face expressed to be drawn in respect of a specific consignment and were attached to the bills of lading in question. Various attempts have been made to establish the contrary, either by claiming that the bank was a trustee for the bill holders[4] or that there was some sort of implied lien or charge on the documents for the proceeds of their sale, but without success, as in *Ex parte Dever*.[5] If both

[1] See Gutteridge, *op. cit.*, p. 19, where the difficulties of the offer and acceptance theory are pointed out.

[2] The legal theory of the confirmed credit has not yet satisfactorily been worked out, and in the absence of authority the above statement of the law is to be regarded as tentative. In particular the question of consideration gives rise to difficulty.

[3] See *Urquhart Lindsay* v. *Eastern Bank*, *supra*, and *Scott* v. *Barclays Bank*, *supra*, per Scrutton, L.J., p. 14.

[4] *Banner* v. *Johnston* (1871), L.R. 5 H.L. 157.

[5] (1884). 13 Q.B.D. 766.

banker and drawer become bankrupt, however, a holder of the former's acceptances might become entitled to the documents under the bankruptcy rule established in *Ex parte Waring*,[1] which is designed, on the bankruptcy of two persons both liable on a negotiable instrument, to prevent one of them from obtaining the benefit of a security when he cannot discharge the obligation in respect of which the security came into his possession.[2]

A confirmed credit is usually expressed to be such, or to be irrevocable, on its face, but any terms which indicate that the banker accepts an unequivocal obligation to honour drafts will be sufficient. Owing to the fact that this type of credit cannot be revoked, it is very necessary that a date be fixed for its expiry, and this usually appears prominently upon the letter. In the absence of such a cancelling date, it is considered that the credit expires within a reasonable time from notification to the beneficiary of its having been opened unless, of course, he has in the meantime acted on it.

**Measure of damages on wrongful withdrawal of credit**

In *Urquhart Lindsay* v. *Eastern Bank*,[3] the important question of how much damages a bank must pay if it wrongly dishonours drafts drawn under a credit was discussed. It was argued for the bank that, since by English law failure to pay a debt does not sound in damages, they could not be liable for more than the amount of the drafts in question, less an allowance for the value of the documents which should have been taken up. While for the sellers it was contended that the bank's failure to take up the draft amounted to a repudiation of the contract as a whole, and that damages must be assessed on that basis. The latter was the view taken by the Court. It is clear, however, that each case must be considered on its merits, and if the evidence shows that the breach of contract by

[1] (1815), 19 Ves. 345.
[2] See *supra*.
[3] [1922] 1 K.B. 318, at p. 323. *Contra* see *Stein* v. *Hambro's Bank* (1921), 9 Ll.L. Rep. 433.

the bank is confined to one particular draft or otherwise indicates that there was no intention to repudiate damages will not be recoverable.[1]

Other types of credit

The machinery of the banker's documentary credit is susceptible of development and extension, and the legal rules governing it are likely to remain fluid for some time. "Revolving credits" have been known for many years though not yet judicially defined.[2] More recently "anticipatory letters of credit" have come into use in certain of the British Dominions, notably Australia and South Africa. The object of these is to enable a seller, who has to obtain the goods with which to implement a contract of sale, to pay for them. This means that the bank has to provide the finance before documents of title are obtainable, and this is achieved by enabling the seller to draw on the bank against the production of documents evidencing the actual existence of the goods which are the subject-matter of the sale, e.g. certificates for goods issued by a warehouseman. It is obvious that this type of security is much less satisfactory than the normal documentary letter of credit.[3]

A point of fundamental importance is that the documentary credit affords an elastic method of making advances covered by easily handled security in the shape of documents. This aspect of the matter is discussed in Chapter XI.

## V. INVESTMENTS

For a long time past bankers have assisted their customers in connection with investments. At first this service was concerned with carrying out specific instructions concerning the purchase or sale of stocks, shares, or other securities. Since the bonds, certificates, or other documents connected with the title to such

[1] Cf. *Prehn* v. *Royal Bank of Liverpool* (1870), L.R. 5 Ex. 92.

[2] Their character was discussed in *Nordskog* v. *National Bank* (1922), 10 Ll.L.R. 652—see the evidence of the manager of Lloyds Bank given therein.

[3] *South African Reserve Bank* v. *M. Samuel & Co., Ltd.* (1931), 40 Ll.L.R. 291.

property were frequently deposited with the banker for safe custody, it was a considerable convenience that he should undertake this work, but the scope of such business did not extend beyond carrying out the specific instructions of the customer. It was said in 1854[1] that "it is not within the scope of the business of bankers to seek or make investments generally for their customers."

As a general statement of the law, this no doubt still holds good, and the banker has no general implied authority to invest his customer's money at his discretion. There would appear to be no reason, however, why money should not be expressly entrusted to a banker for this purpose, in which event it would be his duty to exercise his best skill and judgment over the selection of securities.[2]

Since 1854, however, there can be no question but that it has become a common practice for customers to seek and receive the advice of their bankers as to suitable investments. Sometimes the bank manager accepts the responsibility of expressing his own views as to suitable investment, at other times the opinion of the bank's stockbroker is taken. When it is made clear to the customer that the advice is that of the stockbroker, it would not appear that the bank can be under any responsibility other than to exercise care in the choice of a reputable broker. When the manager gives his opinion, the question may arise as to whether the bank is responsible for it. On the one side it could hardly be suggested that there was any undertaking or warranty by the bank that their servant's advice should be good. Putting the case at its highest against the banker, he would be responsible only for fraud or negligence by his manager. On the other hand, it has been considered that advising as to investments is

[1] *Bishop* v. *Countess of Jersey* (1854), 2 Drew. 143 at p. 163.

[2] The nearest authority for this proposition appears to be *Wilson* v. *United Counties Bank*, [1920] A.C. 102, where the defendant bank undertook to look after the plaintiff's business for him while he was on War Service, and were held liable for their negligent management; but see Paget's criticism of this case, *op. cit.*, p. 73.

outside the scope of banking business altogether,[1] and if this be a correct view of the law the manager could not have had authority to give advice and the banker could not be responsible for the advice given. In the *Banbury Case*, however, no evidence was given as to the practice of bankers in this connection, and in the present writer's view too much weight should not be attached to Lord Parker's dictum. If, as seems probable, evidence can be adduced to show that bankers often do afford this type of service, it seems impossible to resist the conclusion that it has become part of banking business and that bankers are therefore responsible for the advice given by their responsible servants. Moreover, it is certainly an important point that orders for the purchase and sale of stocks and shares are frequently put through their bankers by customers, and it is then the common practice of the banker to share the broker's commission as his remuneration. This question must therefore be regarded as uncovered by authoritative decision, and is one of the few major questions in banking law which are still open.[2]

[1] Cf. per Lord Parker in *Banbury* v. *Bank of Montreal*, [1918] A.C 626.
[2] See a useful article in *The Banker*, Vol. XLV, p. 258.

## CHAPTER XI

# SECURITIES FOR ADVANCES

## I. GENERAL CONSIDERATIONS

BANKERS borrow in order to lend again. Every moneylender must have a lively regard to the chances of obtaining repayment, and from the earliest times he has seldom been content to rely upon the mere obligation of the borrower to repay, but has demanded some more tangible security to which he could have recourse in the event of a failure by the borrower to fulfil his obligations. Unless buttressed by such security, the business of moneylending is very speculative, and can only be carried on on a basis of charging interest so high that it could hardly serve the ordinary requirements of commerce and industry. Although the banker may from time to time allow a good and substantial customer a considerable unsecured overdraft for a short period, such a policy must be regarded as exceptional, and ordinarily he must see that his advances are well covered. This has become increasingly so with the growing size of the banks. The old private banker knew his customers and their businesses more intimately than is possible for a branch manager, while clearly in a large administration such as that of a modern banking company, the discretion entrusted to local agents must be limited in extent, and exercised according to rules laid down at headquarters. All this adds emphasis to the importance of security in present-day banking.

Whenever security is offered there are two quite different questions to be considered; the one economic, involving a forecast of the market value of the security at the time when realisation may have to take place; the other legal, involving such matters as the validity of the security, possibilities of defeasance, difficulties of enforcement, and other like problems. Although

these questions are different, and it is only with the latter that we are here called upon to deal, the two matters are to some extent bound up, in that the banker must consider them both at the same time, and in connection with each other when forming his decision as to whether to accept a given security. The legal aspects of the matter involve a generalised knowledge of a very wide kind, such as can hardly be more than indicated in an elementary work. To take one example only, what are called Stock Exchange securities are frequently offered as security. These consist chiefly of bonds, debentures, government stocks, or stock or shares in limited trading companies. It is obviously impossible to assess the difference in value, from a legal point of view, between debentures and shares, or between preference and ordinary shares, without some knowledge of company law. While an attempt will be made in the following pages to set out the general legal considerations which are relevant to the principal types of security, the student is strongly recommended to consult an elementary textbook on such subjects as company law and land law (for mortgages).

Stock Exchange securities

Change in borrower's legal character

Before proceeding to a detailed discussion, it is necessary to point out one matter of a general character which needs to be borne in mind in connection with all types of security. This is the possible occurrence of an alteration of the legal character of the borrower, which may result in a termination of the original contract between the banker and his borrowing customer. It has already been pointed out[1] that when the composition of a partnership alters, as by the death of one of the members, the original firm ceases to exist. It is obvious, therefore, that any security given by the old firm will not be available to cover the borrowings of the new. In the same way, the voluntary liquidation of a limited company in order that its business may be carried on by another company constituted upon a broader basis terminates the original contract with the banker, and requires a new

[1] See p. 186, *ante*.

arrangement. To laymen such alterations do not appear to be of such a vital character as they do to lawyers, and they are apt to continue their business relation as if nothing had happened. This may, however, lead to considerable legal difficulty.

## II. LIENS AND PLEDGES

Liens and pledges are in theory quite distinct, but the banker's lien is peculiar in that it is in the nature of a pledge, and it is therefore considered advisable to deal with the two matters in the same section.

Kinds of lien

A lien arises when a person having the possession of another's goods or securities is entitled to retain such possession until the owner discharges a debt owing to him. Liens are of two kinds, particular and general. A particular lien gives the right to retain possession only to secure payment of money owing in respect of the particular property over which the lien is exercised, a good example being the carrier's lien for his freight. A general lien gives the right to retain possession until the whole balance of the account owing is paid. The banker's lien is a general lien existing by mercantile custom, and is binding upon the customer whether he knows of it or not.[1] The value of the lien as compared with other types of security is that it arises from events and without any express contract with the customer. It may, for example, prove of great value where security given in some other way has depreciated to a value less than the amount of the debt.

The term "lien" is a popular one with the business community, and is often used with a wider significance than is legally justifiable. For example, the banker is commonly said to have a lien upon a balance in one account against a debit showing in another. A lien, however, can properly exist only in respect of something tangible, and while judicial authority is not wanting for this use of the word,[2] it has been much

[1] *Brandao* v. *Barnett* (1846), 12 Cl. & F. 787.
[2] See *Misa* v. *Currie* (1876), 1 App. Cas. 554.

criticised by text-writers.[1] What clearly does exist in such a case is a right of set-off which is effected by combining the two accounts,[2] and the fact that this is miscalled a lien is not perhaps of much practical importance. It should perhaps be added that this right of set-off applies to all moneys of the customer in the banker's hands except those which have been paid to him for some purpose inconsistent with such a right, e.g. to purchase shares on the customer's behalf, where one of the accounts is known to be a trust account. But where one account is used for business transactions and the other for personal drawings, the matter may be one of some difficulty.[3] The banker has clearly no right to transfer assets from one account to another without the customer's permission; the right of combination can only arise when one account is in debit, and even then in the absence of insolvency it is perhaps necessary that he should give notice of his intention. Some writers consider that all outstanding cheques must be paid before combination,[4] but there is no authority for this view. Combining accounts

A pledge occurs when goods or securities are deposited with the creditor on the condition that if the debt is repaid in due course, the subject-matter of the pledge will be redelivered to the debtor, while, if it is not so repaid, the subject-matter may be sold by the creditor who may recoup himself out of the proceeds of sale. A pledge may, of course, be constituted over property already in the possession of the creditor. It is often expressly agreed between banker and customer that the former is to have a lien over securities of the latter in his possession to cover an overdraft. This is really an agreement for a pledge, Pledge

[1] See Hart, *op. cit.*, p. 848, and Paget, *op. cit.*, p. 358.

[2] See p. 68, *ante*.

[3] *Garnett* v. *M'Kewan* (1872), L.R. 8 Ex. 10, also *Mutton* v. *Peat*, [1900] 2 Ch. 79, *Buckingham* v. *London and Midland Bank* (1895), 12 T.L.R. 70, and *Greenhalgh* v. *Union Bank of Manchester*, [1924] 2 K.B. 153. It is submitted that the real question is one of the intention with which the second account was opened and was that intention sufficiently made known to the banker: see Hart, *op. cit.*, p. 309.

[4] See Thomas, *Banker and Customer*, 4th Ed., p.233.

though the use of the term "lien" is here again inveterate.[1]

Banker's lien

Normally a right of lien is a right to retain possession only and does not carry with it a right of sale. In this it is clearly inferior to a pledge, but the banker's lien is exceptional in this respect and carries with it the valuable right of sale and recoupment. It has indeed been neatly defined as an "implied pledge."[2] It would appear that in such a case notice should be given to the customer of the intention to realise the securities.

The lien does not attach to every conceivable kind of property of the customer which may be in the hands of the banker, and the most difficult question which arises in this connection is as to the types of property over which the banker is entitled to claim it. The principle of the lien being that of an implied pledge it can attach only to such property as the customer by implication agrees that it shall. But decisions depending upon implications are notoriously apt to conflict, for one judge will draw an inference where another will refuse to do so. There appears also to be a presumption in favour of the existence of the lien—as was said in *Brandao* v. *Barnett*,[3] the lien exists "unless there be an express contract, or circumstances which show an implied contract inconsistent with lien."

Cases where there is an express contract do not cause difficulty but are unlikely to be common. The trouble begins when the customer against whose property the lien is claimed asserts that the circumstances show that his intention was that there should be no lien. Broadly speaking, two types of consideration arise in these cases:[4] (*a*) where the property in question is of such a type that one would not expect it to form the subject-matter of an implied pledge; (*b*) where the circumstances under which the property came under

[1] See e.g. Bills of Exchange Act, 1882, s. 27 (3).
[2] *Brandao* v. *Barnett*, *supra*, at p. 806.
[3] (1846), 12 Cl. & F., 787.
[4] See per Kay, J., in *Angus* v. *McLachlan* (1883), 23 Ch.D. 330 at p. 335.

the banker's control suggest that the customer did not intend him to have a lien.

According to Hart,[1] it cannot be said with certainty that the lien attaches to anything except negotiable securities. Paget's opinion,[2] expressed in somewhat more general terms, is perhaps to the same effect. He thinks "that the lien attaches to such securities as a banker ordinarily deals with for his customer otherwise than for safe custody." In *Misa* v. *Currie*[3] Lord Hatherley treats the lien as applying to all documents deposited with a banker, but this is clearly too widely stated. He was prepared, however, to hold that it applied to an authority to collect a debt. In a number of cases where bankers have claimed liens to title deeds,[4] insurance policies, etc., the claim has been rejected not on the ground that such instruments are not susceptible to lien but under head (*b*), i.e. inconsistency of purpose. The lien therefore appears to be confined to documents but it is not possible to say with certainty that any particular class of documents is excluded. There appears, however, to be no case where the lien has been held to attach to documents which do not fall into the class of negotiable or *quasi* negotiable securities. It is suggested therefore that (*a*) such instruments as title deeds to property in land and chattels, are instances of property coming under the first head. Bankers do not normally deal in such types of property unless under the express terms of some contract. When such property belonging to a customer is found in the possession of his banker, it will usually be held that it has been deposited for safe custody, and a lien will therefore equally be negatived under (*b*), for here the purpose of safe custody is clearly inconsistent with lien. This head, however, may give rise to difficulty, and the reasoning to be applied here may perhaps be best seen by looking at examples.

[1] *Op. cit.*, p. 844, *et seq.*
[2] *Op. cit.*, p. 357.
[3] [1876] 1 App. Cas. 554, at., p. 567.
[4] Cf. *Wylde* v. *Radford* (1864), 33 L.J.Ch. 51.

**ILLUSTRATION I**

All cases of deposit for safe custody even of instruments of a negotiable character to which the lien would normally attach are clearly inconsistent with lien.

An interesting question has been raised and discussed[1] as to the position when bonds with coupons are lodged with the banker who when interest or dividends become payable presents the coupons and receives payment on his customer's behalf. Does the lien attach, and if so how far in such a case? This question must be answered by applying the principle already enunciated. In such a case the bond itself is not required for the purpose of obtaining the interest, and is, moreover, usually in the form of a negotiable security.[2] It may be presumed, in the absence of anything to the contrary, to have been left with the bank for purposes of safe custody. The position as to the coupons is perhaps rather more difficult. Although there is no decision on the point, these would appear also to be negotiable. In cases where the whole sheet is left with the bank together with the bond itself, it is suggested that here again the implication is safe custody, and that this is so even if the banker is left to cut off and present the coupons, for this may be regarded as a convenience to save the customer the trouble of coming to the bank to cut off coupons every time payment is due.[3] As soon as the coupon is cut off, however, by the banker for the purpose of collection, then it is no longer held for safe custody and the lien attaches. Even stronger against the implication of lien is the case where the customer keeps share certificates at his bank, and the fact that he instructs the companies in which he holds the shares to pay his dividends directly to the bank would not appear to affect the matter.[4]

[1] See Paget, *op. cit.*, p. 357, *et seq.*

[2] Cf. *Bechuanaland Exploration Co.* v. *London Trading Bank*, [1898] 2 Q.B. 658.

[3] Paget does not agree with this view, and thinks that the fact that the banker removes the coupons makes the difference.

[4] See *Questions on Banking Practice, 7th Ed.*, p. 1097.

### ILLUSTRATION II

Where the customer pays in money to his account for the express purpose of enabling the banker to discharge some obligation incurred on his behalf, as for the payment of the price of shares bought for him the intention is clearly that there should be no lien.

### ILLUSTRATION III. BRANDAO v. BARNETT[1]

The plaintiff's agent had an account with the defendant bankers. It was the agent's duty to purchase exchequer bills for the plaintiff, collect the interest, and, when necessary, get the bills changed for others. He kept them in a tin box at the defendants' bank, and on the occasion which led to the action he took certain of the bills out of the box and handed them to the defendants, requesting them to collect the interest due and change them for others. While they were still in the hands of the defendants, the agent was made bankrupt, and as his account was overdrawn the defendants claimed a lien over the bills in question.

*Held:* There was no lien. The implication was that the bills had been entrusted to the defendants for the express purpose of changing them, after which, as the defendants knew, the new bills would have gone back into the tin box.

### ILLUSTRATION IV

Cases where the lien ordinarily attaches are those where bills, cheques or notes are paid into his bank by a customer to be collected and credited to his account. Even here, however, the lien does not necessarily attach, for the circumstances may show that the money collected was earmarked for a particular purpose which is inconsistent with lien. An example would be where the customer has accepted a bill domiciled at his bank, and then pays in cheques to the amount in question for the purpose of providing the banker with funds to meet the acceptance.

Sometimes, when a lien exists at common law, it applies whether or not the property over which it is claimed belongs to the person who owes the money as in the case of common carriers. This does not seem to be true of the banker's lien. According to Paget[2] "it must now be taken that the general lien extends

[1] (1846), 12 Cl. & F., 787.

[2] *Op. cit.*, p. 359—the case cited *Cuthbert* v. *Robarts Lubbock*, [1909] 2 Ch. 226 is not a decision supporting this view, though it contains a dictum by Cozens-Hardy, M.R., to that effect.; see p. 238.

only to the customer's own securities." This would mean that if a customer paid in instruments which he had stolen, or which he held in a fiduciary capacity, the banker would not be entitled to a lien on them. This seems questionable. Certainly if the securities are negotiable the lien should attach, if only on the basis that it involves an implied pledge, and the full doctrine of negotiability applies to pledges.[1] Moreover, this view if correct would have furnished a short answer to the claim of the defendant in *Brandao* v. *Barnett*.[2]

Several cases have arisen where securities have been deposited with a banker to cover a particular advance, and when this has been repaid but the securities have remained in the possession of the banker, it has been a question whether a lien can be claimed over them to secure an overdraft on the general account. The answer again depends upon the circumstances of each particular case. If, for example, the customer had asked for the return of the securities, it would be clear that he did not intend that there should be a lien. On the other hand, if he had left them without any instructions to the banker, the inference that he intended them to secure his general account could legitimately be drawn.

From the point of view of banking law pledges, as distinguished from liens, arise by express agreement. Usually the same types of property are dealt with by pledge as are available to support a lien, but in addition chattel property can be made use of as security in this way. Bankers, however, have not the facilities for storing merchandise which an extensive use of this type of security would entail, while realisation might be difficult. Apart from goods of great intrinsic value, such as jewellery, pledges of goods are not favoured. It is necessary, however, to notice here a type of security which is in effect an agreement to pledge, of which considerable use is now being made. When the customer is obtaining regular finance from his banker

[1] Bills of Exchange Act, 1882, s. 27 (3).
[2] Cited *supra*—see particularly Lord Campbell at p. 805.

by way of the acceptance by the latter of drafts drawn upon him by sellers of merchandise imported by the customer, it is usual for the customer to make an agreement with the banker under which all property of his which may from time to time come into the hands of the banker, or alternatively, specified property, is declared to be charged for the repayment of the amount of such acceptances. This agreement takes the form of a letter to the banker, signed by the customer, which is called a letter of lien or sometimes of hypothecation.[1] Its effect is to pledge such property of the customer, falling within its terms, as is already in the banker's hands, and provides that any such property afterwards coming into his hands shall be regarded as pledged. Alternatively the letter may be regarded as an agreement to charge.[2] There would appear to be an implied power of sale in the event of default, but the form of agreement commonly used confers an express power of sale.

**Letter of lien**

The right of sale and recoupment is the same in the case of a pledge as in that of lien, i.e. it arises on default. Notice of the intention to sell must be given to the debtor so that he may have a final opportunity to discharge his debt. It is considered by Paget[3] that where securities pledged to secure a specific advance are sold leaving a surplus, the banker is entitled to retain this surplus against a debit on the general account by virtue of his general lien. In the writer's opinion the authorities advanced in support of this opinion do not sustain it, and it must be considered as doubtful, for it appears to conflict with the principle of intention already discussed.

**Property pledged**

The types of property usually given and taken in pledge are negotiable securities, and, to a lesser extent, documents of title to goods, particularly bills of lading, which are, of course, *quasi*-negotiable in character.

[1] For the meaning of the expression "hypothecation," see p. 241. The trust receipt (see p. 240) is a document of similar operation.

[2] *Official Assignee of Madras* v. *Mercantile Bank of India*, [1935] A.C. 53.

[3] *Op. cit.*, p. 396.

From the legal point of view, the negotiable instrument furnishes an ideal security, for apart from the rare possibility of forgery, a *bona fide* holder for value takes a good title, and there is therefore no need to make inquiries and investigations. From the business point of view, this means that such instruments are easily realisable, provided the names upon them are good, which satisfies the banker's primary requirement of liquidity. When the instrument takes the form of a bearer debenture bond issued by an important corporation upon the security of substantial assets every imaginable requirement seems to be satisfied.

The pledgee in these circumstances becomes a holder for value of the instrument to the extent of the sum which he has advanced.[1]

**ILLUSTRATION. LONDON JOINT STOCK BANK *v.* SIMMONS[2]**

The respondent S., who was plaintiff in the action, was the owner of valuable negotiable bonds which were in the possession of a firm of stockbrokers for purposes of safe custody only. A partner in the firm pledged the bonds with the appellant bank as security for an overdraft which he used for his own fraudulent purposes. He had no authority whatever from the respondent to deal with the bonds in question.

*Held:* The bank having acted in good faith, were entitled to such part of the proceeds of the bonds, which they had realised, as would reimburse the amount of their advance. Of the balance, they would be trustees for the respondent.

Per Lord Herschell: "It is surely of the very essence of a negotiable instrument that you may treat the person in possession of it as having authority to deal with it, be he agent or otherwise, unless you know to the contrary, and are not compelled, in order to secure a good title to yourself, to inquire into the nature of his title, or the extent of his authority."

In the case of bills or notes, the customer may either pledge instruments of which he is already the holder or he may draw, make, accept, or otherwise make

[1] Cf. Bills of Exchange Act, 1882, s. 27 (3).
[2] [1892] A.C. 201.

himself liable upon instruments specially created for the purpose of the pledge.

Discount of bill distinguished

As Chalmers points out,[1] it is necessary to distinguish the discount of a bill,[2] from the pledge or deposit of it as security. In theory, the difference is obvious, for the discounter purchases the full property in the instrument, giving its face value less the amount of his discounting charge. This means that the discounting holder has the right to receive the full value of the instrument from those liable upon it without accounting in any way to his transferor, while his rights depend entirely upon the instrument, and he has no separate right of action for debt, as the pledgee has. Thus if he fails to give necessary notices of dishonour he will lose his rights. The pledgee, on the other hand, holds the instrument simply as collateral security, which he may realise at his option, having the right to recover his debt by action if he chooses, whereupon he must, of course, surrender his security.

It may not always be easy to distinguish between the two positions in practice, for it depends upon the intention of the parties which often has to be deduced from the circumstances, no light task when the evidence as may happen is conflicting. A useful test—it cannot be called more—is to see whether the instrument, if bill or note payable to order, bears the customer's endorsement: if it does, it is probable that the intention was that the endorsee should take the full property, if not that it was a pledge.

When a debtor pays his debt, he is entitled to have his securities returned, and the same rule must apply in the case of a pledge of securities—the contrary view apparently taken in *Glasscock* v. *Balls*[3] seems to be based upon a misapprehension. One overwhelming reason for this is that the repayment of the debt does not of itself discharge the instrument in the hands of a holder in due course, so that a pledgee if entitled

[1] *Op. cit.*, p. 103.
[2] As to discounting bills, see also Chapter VI, p. 115, *ante*.
[3] (1890), 24 Q.B.D. 13.

to retain the instrument would be placed in the position to commit a fraud upon the ex-debtor.[1]

Strictly speaking, the only not-negotiable securities which can be pledged are documents of title to goods. There have, however, been occasional instances of persons being estopped from denying the negotiability of instruments issued by them, or handled by them in such a way as to furnish a representation of negotiability.[2] These are rare, however, and it is unlikely that bankers will handle such instruments unless they are in fact treated as negotiable by the usage of the market as in *Goodwin* v. *Robarts*.[3]

Title

When the securities pledged are not negotiable, the rule *nemo dat quod non habet* applies, and the pledgee cannot *prima facie* take a better title than the pledgor had himself, i.e. he takes subject to defects of title in his pledgor. This, of course, means some inquiry into title, or the taking of a definite risk. This risk is, however, considerably mitigated by the protection given to certain holders of such instruments by the Factors Act, 1889,[4] and The Sale of Goods Act, 1893.[5] While in the case of bills of lading, a *bona fide* holder for value, including, of course, a pledgee, at common law took the document free of the unpaid seller's right of stopping the goods in transit.[6] This privilege was extended to other documents of title to goods by the Sale of Goods Act.[7]

The Factors Act, 1889, by Sect. 2 protects pledges by factors acting in the way of their business of documents of title to goods which are in their possession with the consent of the owner, notwithstanding that they have no authority to pledge or act beyond their actual authority. A factor cannot, however, make an

[1] See *Glasscock* v. *Balls*, *supra*, where a fraud of this type was perpetrated.

[2] The best case of this kind is the well-known *Goodwin* v. *Robarts* (1875), 1 App. Cas. 476.

[3] *Supra*.

[4] 52 & 53 Vict., c. 45.

[5] 56 & 57 Vict., c. 71.

[6] Cf. *Lickbarrow* v. *Mason* (1787), 2 T.R. 63.

[7] S. 47.

effective pledge under this section to secure debts already owing by him to the pledgee at the time of the pledge, except in so far as he has himself some right or interest in them.[1]

The Sale of Goods Act, 1893,[2] by Sect. 25 provides that when a person who has sold goods continues in possession of a document of title to them, e.g. a bill of lading, the delivery or transfer by that person or by a factor acting for him of such document of title by way of pledge to a person acting in good faith and without knowledge of the previous sale is as effective as if the person making it had been expressly authorised to do so by the owner. The section contains a similar provision validating unauthorised pledges of documents of title to goods by persons who have bought or agreed to buy goods and have thereupon obtained possession of documents of title to them.

Except in cases of theft, which are rare, if a document of title to goods goes out of its owner's hands, it will probably be either to a factor, in connection with a sale, or as a security, e.g. by pledge. It will be seen, therefore, that this type of security falls not far short of the negotiable instrument in legal value, while from a practical point of view in times of stable markets its liquidity is high.

The bill of lading, which by virtue of its use in connection with bankers' documentary credits,[3] is the document of title to goods most commonly pledged in this way involves numerous legal difficulties, the mastery of which requires considerable legal study. Only a few of the more important can be indicated here. Bill of lading

Under the Bills of Lading Act, 1855,[4] the endorsee of a bill of lading to whom the property has passed under the endorsement, not only takes such property but becomes an assignee of the contract of carriage evidenced in the document. He may, therefore, become

[1] Factors Act, 1889, s. 4; for a more detailed discussion of this important statute see Hart, *op. cit.*, pp. 925, *et seq*

[2] 56 & 57 Vict., c. 71.

[3] See Chapter X, pp. 210, *et seq.*

[4] 18 & 19 Vict., c. 111.

liable to pay freight, demurrage, and other charges. It has been held, however, by the House of Lords that this applies only to an endorsee taking the full ownership, and not to a pledgee.

**ILLUSTRATION. SEWELL *v.* BURDICK**[1]

Goods were shipped to Russia under a bill of lading making them deliverable to the shipper or assigns. The shipper pledged this document with the defendant, a banker, as security for a loan, endorsing to him the bill of lading.[2] The goods were seized by the Russian Customs and sold to pay duty due on them, and the amount realised by the sale did not pay the duty owing. The defendant banker never presented his bill of lading, or took possession of the goods. The shipowner, the plaintiff in the action, demanded his freight, which had not been paid, from the defendant, contending that under the Bills of Lading Act the obligation to pay the freight had passed to the defendant when he became endorsee of the bill of lading.

*Held*: The defendant was not liable, for the obligations arising from the contract pass only to an endorsee who takes the full or general property in the bill of lading, and not to a person who like a pledgee takes only a special property.

The value of this decision from the point of view of a pledgee, however, has been to some extent detracted from by a later decision,[3] for it has been held that should the pledgee come under the necessity of presenting his bill of lading in order to enforce his security by obtaining possession of the goods, he impliedly undertakes to fulfil the terms of the contract evidenced by it, and may thus become liable for freight, demurrage, and other charges independently of the Bills of Lading Act.

**ILLUSTRATION. BRANDT *v.* LIVERPOOL, BRAZIL, AND PLATE STEAM NAVIGATION CO.**[4]

A quantity of zinc ashes was shipped in bags from an American port to Liverpool under a bill of lading in the

[1] (1884), 10 App. Cas. 74.

[2] In the case of a bill of lading for delivery to a named person or assigns or order endorsement is necessary in order to put the pledgee in a position to obtain delivery of the goods from the ship.

[3] *Brandt* v. *Liverpool, Brazil and Plate Steam Navigation Co.*, [1924] 1 K.B. 575.

[4] *Supra.*

ordinary form, which was afterwards pledged with the plaintiff as security for a loan. Some of the bags got very wet and had to be removed during the voyage and reconditioned. The plaintiff presented his bill of lading and took possession of the goods at Liverpool. He then brought an action against the shipowners for damages for the delay in carrying out the contract and they counterclaimed for the cost of reconditioning the goods. The defendants contended that the plaintiff as a pledgee was not an assignee of the contract under the Bills of Lading Act.

*Held*: That as the plaintiff had taken delivery of the goods under the bill of lading he acquired the rights and obligations under the contract evidenced by it, and was entitled to damages for the delay, and must pay for the reconditioning of the goods.

Another possible source of danger to pledgees of bills of lading arises from the fact that they are issued in sets usually of three. It would be quite possible for a fraudulent shipper, therefore, to pledge each of the three copies in the set. The shipowner's obligation is to deliver the goods to the first person who presents a bill of lading in proper order, so that the more tardy pledgees might find that their security was worthless.

**ILLUSTRATION. GLYN, MILLS & CO. *v.* EAST AND WEST INDIA DOCK CO.[1]**

A set of three bills of lading was issued in respect of a consignment of goods shipped to London, and two of these were sent to the consignee who pledged the first of them with the plaintiff bankers as security for a loan. The goods were afterwards discharged from the ship and placed in the defendant dock company's warehouse, subject to a stop for the freight which had not been forthcoming upon the arrival of the ship. The consignee presented his second copy of the bill of lading to the defendants and, on paying the freight, was given possession of the goods through a sub-purchaser to whom he had given delivery orders on the defendants. The plaintiffs, on discovering what had happened, sued the defendants for the conversion of their goods.

*Held*: That the defendants, having delivered the goods *bona fide* and without knowledge of the transfer of the first bill of lading, had acted within their rights, and were not liable.

[1] (1882) 7 App. Cas. 591.

This difficulty can be easily overcome by the pledgee obtaining the complete set of bills, and this is now the usual practice.

Trust receipt

As has already been pointed out, the banker is not a merchant, and indeed the business of disposing of the goods is that of the customer. A method of enabling the latter to handle the documents without unduly impairing the banker's security has had to be devised. This has been done by means of the trust receipt which is given by the customer in return for the custody of the documents.[1] By the terms of the trust receipt,[2] the customer acknowledges that he has received from the banker the bill of lading and other relevant documents which he undertakes to hold, as also the money received from the sale of the goods which they represent, in trust for the banker. Such a document is not a bill of sale, and, should the customer become bankrupt, the banker is a secured creditor.

**ILLUSTRATION. RE DAVID ALLESTER LTD.**[3]

The company pledged bills of lading with Barclays Bank to secure an overdraft. When it was time to sell the goods represented by the bills of lading, the company in accordance with mercantile practice obtained the bills of lading from the bank on giving the usual trust receipt by which it was acknowledged that the bills of lading were received in trust for the bank and that the goods when received and the proceeds thereof when sold should be so held, and the proceeds remitted to the bank as the goods were realised. The company went into liquidation before several bills of lading had been dealt with, and the question arose whether they were part of the assets.

*Held:* The letter of trust was not a bill of sale, and in any event the bank retained its rights under the letter as pledgee.

[1] Very often the banker sends the document to the customer with an accompanying memorandum setting out the terms on which the customer is to hold and use them. Such a memorandum is called a letter of hypothecation or letter of trust. The written acceptance of its terms by the customer amounts to a trust receipt. See Appendix.

[2] See example, p. 336, *post*.

[3] [1922] 2 Ch. 211; see also *Official Receiver of Madras* v. *Mercantile Bank*, [1935] A.C. 53, and p. 212, *ante*.

Nor are the goods considered as being within the "order and disposition" of the buyer within the meaning of Sect. 38 of the Bankruptcy Act, 1914, under which the property of a third person in the hands of a bankrupt in connection with his trade or business may become divisible among his creditors.[1] Should the customer act in bad faith as by failing to pay over the receipts of a sale to the banker, or by pledging them with some other lender the banker appears to be unprotected, for such a pledge is governed by the Factors Act, 1889, and the pledgee takes a good title.[2] The modern trust receipt is a complicated document, which has so far been very little before the Courts, and there are no doubt many matters in relation to it which still wait to be cleared up.[3]

**Hypothecation**

Pledge, as has been shown, depends upon possession passing to the pledgee. An owner remaining in possession cannot effectively pledge, though he may undertake to give up possession on demand. Such a promise to give possession as security is called a hypothecation, an expression defined by Hart[4] in this way: "Where property is charged with the amount of a debt, but neither ownership nor possession is passed to the creditor, it is said to be hypothecated." Contracts of hypothecation were not originally recognised by English law as conferring any rights other than those arising out of the bare contract, i.e. they conferred no security. A contract or letter of hypothecation appears now, however, to confer equitable rights over the property hypothecated, and is treated in the same way as a trust receipt, the two terms being sometimes used interchangeably.[5] The terms of a hypothecation should be

[1] See case last cited, also *Re Hamilton Young*, [1905] 2 K.B. 772.

[2] *Lloyds Bank v. Bank of America, etc.*, [1937] 2 K.B. 631; [1938] 2 K.B. 147.

[3] See Gutteridge, *Bankers' Commercial Credits*, p. 75.

[4] *Op. cit.*, p. 906.

[5] Strictly speaking, the letter of hypothecation should precede the trust receipt which should come into existence as a result of it. The trust receipt is given when the banker hands the documents to the customer which is not really a hypothecation at all; hypothecation in the strict sense would take place if the banker did not receive the documents.

evidenced by a written memorandum setting out the various obligations which the customer undertakes. It should be noticed that the term "hypothecation" has never become a term of art in English law, and is used by business people with a somewhat loose connotation, for instance the memorandum accompanying a pledge of documents of title to goods, by which the pledgor authorises the pledgee to dispose of the goods in the event of his failing to discharge his obligation is commonly called a letter of hypothecation.[1]

## III. GUARANTEES

A less tangible but very effective form of security is to obtain a guarantee of the loan or overdraft from some third party whose financial stability can be relied upon. Since the effectiveness of the guarantee depends upon the solvency of the surety,[2] the banker will often insist upon the provision of other security in support of the guarantee. Security by guarantee has two main aspects, the business and the legal. The business side of the matter is concerned with the continued solvency of the surety, the legal side with the provision of an effective contract which will in all conceivable circumstances give the banker a good legal remedy against the surety. It must always be borne in mind in dealing with this subject that the law leans in favour of the guarantor, and that if the creditor oversteps in any way the letter of his contract he will usually find that his security has vanished. So much is this so that the bankers have felt obliged with the assistance of their legal advisers to work out elaborate forms of contract.[3] These vary but slightly from one bank to another, and if used with knowledge and understanding of the objects of the various clauses they furnish a fairly complete safeguard on the legal side

[1] See Minty, *op. cit.*, p. 222.

[2] The word "surety" has exactly the same significance as the word "guarantor." The common usage of guarantee as the equivalent of warranty, e.g. of the purity of goods, should be avoided.

[3] In reading this section the student should make frequent reference to the form of guarantee printed in Appendix II.

of the business. The object, says Paget, is "to keep a free hand for the bank and a tight one on the guarantor."[1]

Naturally in practice no manager would accept a guarantee which was not in the usual terms without the confirmation of the head office and the legal department, and therefore the pitfalls which normally encompass a creditor relying upon a contract of guarantee should be easily avoided. It is essential, however, that the bank should observe and act upon any preliminary conditions upon which the guarantee is given if such there be, as otherwise the carefully drawn terms of the instrument may fail to operate altogether.

**ILLUSTRATION. BURTON *v.* GRAY**[2]

The plaintiff handed to his brother certain securities, which the brother took to the defendant banker for the purpose of obtaining a loan. He showed a letter purporting to be signed by the plaintiff, and giving a charge upon the securities "in consideration of your lending F. Burton the sum of £1000 for seven days from this date." Instead of lending that sum to the brother, the defendant allowed him to overdraw his account by means of a number of cheques, the amount of the overdraft being rather less than £1000.

*Held:* That the terms of the deposit required an immediate advance of £1000 and had not been fulfilled, and that the defendant must give up the securities.

The general use of forms of guarantee makes it unnecessary to embark upon a detailed consideration of the general principles of the law of guarantee, a subject which in any event is adequately dealt with in the textbooks upon commercial law. It is not, however, possible to appreciate the purpose of many of the terms in the standard form without some knowledge of the principles which have called them into being, and it will be necessary to mention shortly therefore certain elementary rules: the student is, however, advised to refresh his memory by reading the appropriate chapter in some standard textbook.[3] Principles of law

[1] *Op. cit.*, p. 420.
[2] (1873) 8 Ch. App. 932.
[3] E.g. *Slater's Mercantile Law.*

(*a*) In law a guarantee is a particular form of contract, viz. "to answer for the debt, default, or miscarriage" of another. According to Anson[1] it can always be reduced to the formula "deal with A and if he does not pay you I will."

*Examples.* (i) The guarantor says to a banker "let my friend have an overdraft up to £100, and if he does not repay it I will do so." (ii) The guarantor says to the banker "allow my friend's present overdraft to stand for six months, and if he has not reimbursed you at the end of that period I will do so."

As with every other contract, there must be consideration, or an instrument under seal. It is sufficient, of course, that the debtor should have the benefit of the consideration; the surety may well be a complete volunteer. The question of consideration must be borne in mind. Suppose the banker had already agreed to allow an overdraft, and then becoming doubtful asked the customer to find a guarantor. Should he do so, it would be necessary to see that some extension of the terms of the original agreement for the overdraft was given, e.g. by way of extension of time or period, otherwise there would be lack of consideration.

(*b*) Contracts of guarantee come within the well-known Sect. 4 of the Statute of Frauds, and are therefore unenforceable by action unless evidenced by a memorandum in writing signed by the surety or his agent on his behalf. It is not necessary in the case of guarantee that the memorandum should set out the consideration.[2] The use of the standard form, of course, fulfils the requirements of the statute, but, if any alterations are agreed upon, these must also be reduced to writing, or they will either be inoperative, or, if of a fundamental character, have the effect of destroying the contract evidenced in the form.[3] The memorandum may come into existence by exchange of correspondence before the standard form has been signed. It

[1] *Law of Contract*, 18th Ed., p. 64.

[2] Mercantile Law Amendment Act, 1856, 19 & 20 Vict., c. 97, s. 3. An undertaking to become surety should be similarly evidenced.

[3] Cf. *Morris* v. *Baron*, [1918] A.C. 1.

might become necessary to rely upon this in case the surety afterwards went back upon his word and refused to sign the form.

It is often a difficult problem to distinguish a contract of guarantee from a contract of indemnity, a difference which may be of importance since the latter type does not require a written memorandum. In banking, this question is, however, unlikely to arise since the intention of the parties should be clear, and cannot arise if the standard form is used.

(*c*) One question which has been litigated is whether the creditor is under the obligation to disclose to the guarantor information which he has about the debtor which makes it probable that he, the guarantor, will be called upon to pay; information which if disclosed to the guarantor might well lead to his refusing to enter into the contract. Such an obligation could only exist if the contract were one of the utmost good faith (*uberrimae fidei*). It has been held that no such obligation exists.

**ILLUSTRATION. NATIONAL PROVINCIAL BANK *v.* GLANUSK**[1]

The defendant guaranteed the account of his agent with the plaintiffs, and was afterwards called upon to discharge his obligation. He contended that at the time he gave the guarantee the manager of the plaintiff's branch, where the account was kept, was aware or suspected that the agent was defrauding his principal, and that he ought to have communicated his knowledge.

*Held:* That assuming that there was such suspicion, the plaintiffs were under no obligation to make any disclosure to the defendant.

It is indeed very arguable that the mention of such information without the express authorisation of the customer would be a breach of the banker's duty to keep his affairs confidential.[2]

[1] [1913] 3 K.B. 335. See also *Westminster Bank, Ltd.* v. *Cond* (1941), 46 Com. Cas. 60.

[2] See *Tournier* v. *National Provincial Bank*, [1924] 1 K.B. 461, and discussion in Chapter III, p 17, above. Paget (*op. cit.*, p. 423) suggests that in the event of the proposed surety asking questions with a view to elucidating the position, the banker has implied authority to answer them. This seems doubtful. The safe course is for the surety to ask the debtor for permission to inquire.

The position is the same if the banker is granting the advance in order to provide for the payment of an old debt.[1]

The so-called fidelity guarantee by which the surety binds himself to make good losses resulting from fraud or breach of trust on the part of a person in a position of confidence or responsibility, is really a form of insurance, and in such cases full disclosure of material matters is called for.

(*d*) In many cases the proposed surety will be introduced to the bank by the customer. He may be a person unversed in affairs, in which event the banker will probably explain to him the nature of the transaction. Such an explanation appears to "amount to a representation or at least is evidence of a representation that there is nothing in the transaction which might not naturally be expected to take place between the parties to a transaction such as that described."[2] It is important, therefore, that all statements made should be accurate, for misrepresentation, though innocent, will avoid the contract.

**ILLUSTRATION. STONE *v.* COMPTON**[3]

The defendant became party to a promissory note in order to secure an advance made by the plaintiff banker to a customer. The debtor himself entered into a deed of mortgage which contained an inaccurate recital from which it appeared that at the time of the advance nothing was owing from the debtor to the plaintiff, although in fact a substantial sum of money was owing which was to be paid off out of the advance. This recital was read in the presence of the defendant before he signed the promissory note, and it was held that in the circumstances he was not bound by his signature.

(*e*) Sometimes the customer may be left to obtain the signature of the surety to the bank's standard form of guarantee entrusted to him for that purpose. The question may then arise as to whether the customer

[1] *Hamilton* v. *Watson* (1845), 12 Cl. & F. 109.
[2] *Lee* v. *Jones* (1864), 17 C.B.N.S. 482.
[3] (1838), 5 Bing. N.C. 142.

has been constituted the agent of the banker to make representations to the surety. In the only case where this contention has so far been advanced, it was negatived by the jury,[1] and the danger of its being accepted is not perhaps a very serious one. It can in any case be avoided by the presence of a competent official of the bank on the execution of the memorandum of guarantee.

(*f*) Cases have occurred where the guarantor has been able to claim that the whole transaction was void for mistake.

### ILLUSTRATION. CARLISLE AND DISTRICT BANK *v.* BRAGG[2]

The defendant signed a document purporting to be a guarantee by him to the plaintiffs of the account of one of their customers, R. The document was in fact a form of guarantee entrusted to R by the plaintiffs in order that he might obtain the defendant's signature to it. R, however, represented to the defendant that the document was an insurance paper, and he signed it in the belief that this was so. In an action by the plaintiffs to enforce the guarantee—

*Held:* That there was a fundamental mistake as to the nature of the transaction on the part of the defendant, and that the contract of guarantee was therefore a nullity. The defendant was not liable.

This case indicates that there is a further and more serious danger in entrusting the debtor with the task of obtaining the surety's signature than that already mentioned. A debtor at his wits' end for accommodation may be capable of any fraud. The decision has, however, been much criticised, and it must be remembered that the fact that the surety has made a mistake as to the contents of a document, or has misunderstood its terms will not free him from liability.[3]

(*g*) Full capacity to contract is, of course, necessary. This means, for example, that an infant cannot bind himself by becoming a surety. Again a contract of guarantee may be *ultra vires* a limited company under

[1] *Carlisle and District Bank* v. *Bragg*, [1911] 1 K.B. 489.

[2] *Supra*.

[3] *Howatson* v. *Webb*, [1907] 1 Ch. 537; *Stewart & McDonald* v. *Young* (1894), 38 S.J. 385.

its memorandum of association, which should always be inspected before accepting it as a surety. In cases where there is a fiduciary relationship between the debtor and the guarantor allegations of undue influence which if substantiated will make the contract voidable, are always possible. If, for example, a solicitor's account is to be guaranteed by a client, or that of a husband by his wife, the banker should always insist that the guarantor should have independent advice before signing the contract—it is valueless to do this after the signature has been obtained.[1] There is no presumption of undue influence by a husband over his wife in connection with a contract to which they are parties, but very little evidence of influence is required to establish a case.[2]

(*h*) If it is proposed that there should be more than one surety, the banker should see that they each give a several undertaking to be bound. If the guarantee is joint only, as opposed to joint and several, the sureties are only liable so to speak *en bloc*, so that if proceedings be taken against some of them only, and judgment obtained, the others will be released from their obligations.[3] Several sureties may however be sued individually, and each is liable for the whole amount.

(*i*) The duration of the guarantee is naturally of importance. The surety will naturally wish in most cases to limit the period of his liability, and may stipulate that the guarantee is only to be for a limited period. This should only give rise to difficulty, if at all, at the termination of the period in question.[4] If, however, the time is left indefinite, there is an implied agreement that it is to continue until revoked by the surety. The form of guarantee used by the banks is clearly worded to make the obligation a continuing one—e.g. "for so long as the bank may think fit". . . . "shall be a continuing security . . . ." It must also be distinguished from a "specific" guarantee, which

[1] *McKenzie* v. *Royal Bank of Canada*, [1934] A.C. 468.
[2] *Ibid.*
[3] Cf. *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504.
[4] See below, p. 252.

guarantees a specific debt only, and quite possibly an existing specific debt, and is discharged as soon as the debt in question is repaid, even if at once replaced by another loan. Again, if the guarantee provide for the repayment of a specific advance, and some larger sum be lent the surety will not be liable. A specific guarantee is in ordinary circumstances clearly valueless to a banker who is concerned with a running account. The form commonly used accordingly covers all advances and liabilities made or to be made, and makes the surety liable for "the ultimate balance."

### ILLUSTRATIONS

"I hereby guarantee A's account to the amount of £100." This is specific.[1]

"I hereby hold myself responsible as a guarantee for £100 and in default of payment of any accounts due I bind myself to pay whatever may be owing to the amount not exceeding £100." This is continuing.[2]

"I guarantee the ultimate balance, etc." This covers the amount due from the customer upon all accounts.[3]

*Prima facie*, when a guarantor on a continuing guarantee guarantees a floating balance up to a limited amount the guarantee is presumed to be applicable only to an amount of the debt equivalent to the amount of the guarantee. This is not to the advantage of the bank, which is in a better position if the amount of the guarantee extends to the whole debt, even though the total liability of the surety is to be limited to a given sum. This can be secured by the form of words used in *Re Sass*[4] viz. "guarantee payment . . . sum or sums which may be now or may hereafter from time to time become due or owing by S. . . . to be a security for the whole amount now owing to you or which may hereafter from time to time become owing to you by S. but nevertheless the total amount recoverable hereon shall not exceed £300 . . . And in

[1] See *Allnutt* v. *Ashenden* (1843), 5 M. & G. 392.
[2] See *Wood* v. *Priestner* (1867), L.R. 2 Ex. 282.
[3] See *Mutton* v. *Peat*, [1900] 2 Ch. 79.
[4] [1896] 2 Q.B. 12.

case of bankruptcy any dividends which you may receive from the estate of S. shall not prejudice your right to recover from me to the full extent of this guarantee any sum which after the receipt of such dividends may remain owing to you by S."

**ILLUSTRATION**

A guarantees B's overdraft up to £1000. B becomes bankrupt and pays ten shillings in the pound. A on paying £1000 to the bank becomes entitled to recover £500 from B's trustee in bankruptcy. This reduces the estate by that amount, and, if the bank is also proving as an unsecured creditor, its position is to that extent worsened. If, however, a clause such as that just set out has been used, A is not entitled to prove in the bankruptcy in competition with the bank, and the fact that the bank proves does not prejudice its position as to recovering from A.

(*j*) The usual form[1] gives the banker power to renew advances, to grant further time, or indulgence to, or to compound with the debtor, or to alter the terms of his obligation, or to deal similarly with a joint surety without the surety's assent, or with the debtor's trustee in bankruptcy or some similar form of words. This is one of the most valuable clauses in the contract from the point of view of the banker. One of the chief weaknesses of the guarantee as a security is its liability to be defeated because the debtor and creditor have come to some arrangement which might prejudice the position of the surety, or alters the terms of the obligation which he has guaranteed. The law is jealous to safeguard the position of sureties, and the cases are full of what at first sight might be considered unexpected instances of the discharge of contracts of guarantee owing to some act of clemency by the creditor towards the debtor, such as a binding obligation to give him further time in which to pay his debt. On examination, however, it will be found that such an arrangement might in fact prejudice the position of the surety, for during the extended period the financial position of the debtor might grow worse, so that

[1] See Appendix II, p. 330, *post*.

when eventually called upon to pay he might find that his right over against the debtor had become worthless. A mere forbearance by the creditor to sue the debtor does not however discharge the surety, for as soon as there is default he is entitled if he chooses to have the position liquidated. For the same reason the creditor when entering into a binding agreement to give time, or otherwise to alter the obligations of the debtor may reserve his rights and remedies as they exist when the extension of time or other facility is granted.[1] The effect of this is to give the creditor the right to call upon the surety to pay at once, although the debtor cannot for the time being be required to do so. The surety on making payment is, of course, entitled to recover from the debtor at once.

In the same way a creditor may find that he has prejudiced his position under a guarantee by granting some privilege to a co-surety as a result of which the value of the other surety's right of contribution might be diminished; or again by coming to some arrangement with the debtor's trustee in bankruptcy. An examination of the clause already quoted will show that it is designed to prevent difficulties of this kind from arising.

Again the form gives the banker power to realise any securities which he may hold against the debt, and to accept further securities without accounting therefor to the surety, and to substitute one security for another. This is equally an essential clause. As we have seen, guarantees are commonly buttressed by other forms of security, and according to the general law a surety who pays under a guarantee is entitled to take over all such securities, and equitable rights of the creditor. Moreover, it is an implied obligation on the part of the creditor that he will do nothing to diminish the value of such rights and securities. The form is

[1] *Boultbee* v. *Stubbs* (1811), 18 Ves. 20; see also an explanation of this somewhat peculiar doctrine by Wood, V.C., in *Webb* v. *Hewitt* (1857), 3 K. & J. 438. He says that when sued by the surety the debtor cannot reply that the debt is not yet due, for he was a party to the arrangement. He also says that the question whether the surety was informed is immaterial.

intended to free the creditor from this obligation, and to give him a free hand.

It may further happen that the surety has himself had the foresight to buttress himself by taking security from the debtor, or may decide to do so in future. This to some extent diminishes the cover available for the banker. In its more extreme form, therefore, the standard guarantee provides (*a*) "that the banker shall have a lien on all securities belonging to the debtor which the surety at any time holds," and (*b*) that the surety "will not himself take security from the debtor, or alternatively that should he do so the value thereof shall be added to the sum for which he is liable."

(*k*) *Termination of the contract* may, of course, take place in various ways according to the usual rules of law. The position then arising may, however, be difficult, and is worthy of close attention—

(i) As has already been noted in the case of a specific guarantee, the payment of the debt discharges the surety, and may even do so with a continuing guarantee unless the contract safeguards the position. The standard forms accordingly provide that the surety shall be liable for the "ultimate balance" of the account.

(ii) Subject to the terms of his contract the surety can always give notice that he will not accept responsibility for further advance.

**ILLUSTRATION. OFFORD *v.* DAVIES[1]**

The defendant signed a guarantee of which this was the essential part: "We hereby, jointly and severally guarantee for the space of twelve calendar months the due payment of such bills to the extent of £600 . . ." After some transactions had taken place and been completed within the terms of the guarantee, but within the period of twelve months the defendants gave notice revoking the guarantee.

*Held:* That they were entitled to do so.

On giving such notice, the surety must, of course, pay the amount for which he was liable at that date under the terms of the guarantee, if called upon to do so.[2]

[1] *Offord* v. *Davies* (1862), 12 C.B.N.S. 748.
[2] *Beckett* v. *Addyman* (1882), 9 Q.B.D. 783 at 791.

This position has been regarded as unsatisfactory by bankers, and the standard forms provide that the surety must give a specified notice of determination, usually three months, if he desires to withdraw, and sometimes further requires that he must pay all sums outstanding on the guarantee at the date of the receipt of such notice, or subsequently accruing by reason of any engagement entered into before the receipt of such notice. The efficacy of this clause has given rise to discussion. The later part appears to embody the rule of law which would in any case be applicable, though in the absence of decision it is no doubt useful to have the point provided for. With regard to the three months' notice, it has been questioned[1] whether after the receipt of notice the banker can still continue to make advances, apart from those to which he has already engaged himself, during the intervening period. It has been contended that it would be inequitable to allow him to do so. This view appears to the writer unduly to circumscribe the meaning of the words used, and to press hardly upon the customer who may have already embarked on transactions which will eventually require the financial support of his banker. In the absence of authority, it may be considered advisable to provide expressly that the surety is to be liable for advances made within the limit of the guarantee, during the currency of a notice of revocation.

The position which arises at the time when the notice of revocation takes effect requires attention. At that date the advance will stand at a particular figure, and it is possible that the banker will not immediately take action against the surety, and will allow the account to be operated in the ordinary way. Should this occur, he may find that the value of the guarantee has considerably diminished or altogether disappeared, for any payments in must be used to reduce the liability of the surety, while drawings are no longer covered

[1] See Paget, *op. cit.*, pp. 429–30, who takes this view, but sets out the argument on either side.

by the guarantee, which has been determined. Some standard forms provide for this situation by declaring that the account may be continued without prejudice to the liability of the surety, which it is agreed shall remain for the amount due at the date of the termination, notwithstanding subsequent payments in or out.

(iii) *Notice of Death.* The death of the debtor which terminates the relationship of banker and customer presumably determines the guarantee. The position on the death of the surety is more difficult. It does not of itself determine the guarantee, and a banker making advances after it has taken place but without knowledge of it is clearly entitled to call upon the executors to carry out the contract.[1] Notice of the death, however, appears to operate as a notice to revoke,[2] and the banker will usually rule off the account, and open a new one as from that date, in order to protect the position as it then stands.

**ILLUSTRATION. RE SHERRY; LONDON AND COUNTY BANK *v.* TERRY[3]**

Sherry had guaranteed the account of the defendant with the plaintiffs on a continuing guarantee. He died and the bank, having received notice of this event, closed the defendant's account, which was overdrawn, and opened a new one which they debited with the interest upon the first. The defendant, who had made various payments into the new account, eventually became insolvent, and it was contended by the executors of the surety, Sherry, that they were entitled to the benefit of the payments into the second account.

*Held:* That the two accounts were quite separate, and that the executors were liable to discharge the overdraft as it existed at the time of the notice of the surety's death, subject to any dividend received.

These questions not being free from difficulty, however,[4] the form provides that the guarantee shall subsist notwithstanding the death of the surety, until the period for which it was given expires, or the personal representatives give the prescribed notice of termination.

[1] *Bradbury* v. *Morgan* (1862), 1 H. & C. 249.
[2] *Coulthart* v. *Clementson* (1879), 5 Q.B.D. 42.
[3] (1884), 25 Ch.D. 692.
[4] See Hart, *op. cit.*, pp. 817, *et seq.*, Paget, *op. cit.*, p. 431.

The death of one of several joint sureties does not release the others from their obligation.[1]

(iv). *Lunacy* would appear to operate in the same way as death, though there is very little authority upon this point.[2]

(v) *Bankruptcy.* The bankruptcy of the debtor does not affect the guarantee, except that it provides the occasion for its enforcement. It is possible, however, that the creditor may wish to adopt one or other of various courses which may be available on insolvency, such as becoming a party to a composition with the debtor. Such a position might prejudice the position of the surety in the way already discussed in note (*j*). The standard forms of guarantee provide for these circumstances by giving to the banker the right to enter into compositions with the debtor without prejudice to the position, and by declaring that the surety shall forego the exercise of all rights against the debtor in the bankruptcy proceedings which prejudice or compete with the bank.

(vi) *Alterations* in the terms or conditions of the debt, as we have already seen, discharge the surety unless provided for by agreement.

(vii) *Alterations* in the legal constitution of the parties to the debt operate in the same way. Thus either the creditor or the debtor may be a partnership, a committee, trustees, or otherwise liable on a joint account, and a change may take place by death, or retirement, of an old member, or the accession of a new one. Again one of the parties may be a corporation which, as has often taken place in the case of banking companies, may lose its legal identity by amalgamation with some other concern.[3] If the party in question transfers all its rights and assets to the other concern before dissolution, the position as it exists at the time of the assignment can be preserved but the guarantee

[1] *Beckett* v. *Addyman* (1882), 9 Q.B.D. 783.

[2] See *Bradford Old Bank* v. *Sutcliffe*, [1918] 2 K.B. 833; see also in Court of first instance, 23 Com. Cas. 299.

[3] *Ibid.*

is terminated as regards the future.[1] The standard forms obviate this difficulty by providing that the guarantee is to enure for the benefit of any other bank with which the creditor bank may become amalgamated, and is to remain effective notwithstanding any change in the constitution of the debtor.

(viii) The *release* of the debt by the creditor is the equivalent of payment, for the debt no longer existing, the surety's obligation is gone. Forbearance to sue does not amount to a release. The contract may provide that the release of the debt is not to discharge the surety and this is legally effective.[2] The standard forms contain a provision which produces this effect.

**ILLUSTRATION. PERRY *v.* NATIONAL PROVINCIAL BANK**[3]

The plaintiff was a surety on a guarantee in favour of the defendants, and as such executed to them certain mortgages as further security. The mortgage deeds gave the bank the right "to vary exchange or release" the securities, and "to compound with, give time for payment of," and accept compositions from and make any arrangements with the debtors. Eventually the debtor became insolvent and entered into an arrangement with his creditors, by which he was to issue debentures to them which they were to accept in full discharge of their debts. The defendants accepted debentures for a certain portion of the amount owing to them, but not for the sum at which they valued their mortgage. The surety, however, claimed that he was discharged and sued for the reconveyance of the mortgaged property.

*Held*: That notwithstanding the fact that the debtor had been released by the operation of the scheme of arrangement the rights of the bank against the surety were preserved by the words of the mortgage deed in respect of the amount for which it had not accepted debentures.

The release of a joint co-surety releases the others because it prejudices their rights to receive contribution from the released surety in the event of their being called upon to pay the creditor.[4] If the rights

[1] *Perry* v. *National Provincial Bank*, [1910] 1 Ch. 464.
[2] *Ibid.*
[3] *Ibid.*
[4] *Mercantile Bank of Sydney* v. *Taylor*, [1893] A.C. 317.

of the co-sureties are, however, not prejudiced, as may be the case where he is a several and not a joint surety, they are not released from their obligation.[1] A several surety has, however, a right of contribution, so that it may be dangerous to release even one of a number of several sureties without having bargained for the right to do so in the contract of guarantee.

(*l*) *Enforcement* of the guarantee can take place as soon as the debtor is in default. It is not necessary for the creditor to sue the debtor first, or even to call upon him to pay, or to realise any securities which he may have. Moreover it is not even necessary that the surety should be called upon to pay before proceedings are taken against him. It is common sense, however, to make such a demand, and the standard forms stipulate that this shall be done, but provide that the requirement shall be deemed to have been complied with if sent by letter to the surety's address as set out in the contract.

The requirement of such a notice has the advantage of preventing possible difficulties under the Limitation Act, 1939, for time cannot begin to run in favour of the surety until the necessary notice has been sent to him. In other cases the position may be difficult, for it is not certain whether time runs from the date of each advance covered by the guarantee, or only from the time when the surety fails to comply with a demand for payment. In theory, since the surety becomes immediately liable without any demand the former view should be correct. It is not, however, consistent with the business purposes of a guarantee, and though there is authority in support of either view the second one seems preferable.[2]

## IV. MORTGAGES AND CHARGES

The mortgage is a method of transferring the ownership[3] General considerations

[1] *Ward* v. *National Bank of New Zealand* (1883), 8 App. Cas. 755.

[2] See the cases discussed in Paget, *op. cit.*, p. 444.

[3] This general statement is not true in the letter—though it is in substance—of post-1925 mortgages of land. Such mortgages are now effected by a charge or by a long lease or sublease of the land.

of property to the lender while ensuring that the borrower shall continue in possession—at any rate provided he pays interest regularly. It is thus the exact opposite of pledge where the borrower gives up possession but retains his ownership. At first sight it appears an ideal form of security; for the lender should if necessary be able to realise the full value of the property, less, of course, the expense of doing so, while he avoids the trouble and expense of looking after it, the borrower meanwhile continuing in the enjoyment of it. Unfortunately, things are not quite so simple. Apart from the fact that realisation may yield much less than the figure taken as the value of the property at the time of the loan, there are numerous legal pitfalls in connection with mortgages which make it essential that the transaction should be effected through lawyers, and, even with their assistance, it is quite possible that mistakes may be made which will take away from the value of the security. The revolutionary changes in land law effected by the legislation of 1925 have, however, done much to mitigate these difficulties, so far as land is concerned.

Again, before the property can be realised, various legal requirements may have to be fulfilled which naturally take time and money. The mortgage, at any rate of certain types of property, such as factories and country estates and farms, is not a popular type of security with banks —it is perhaps the least "liquid" of any. As, however, certain classes of borrowers are not in a position to offer anything else, the mortgage is in practice very commonly met with.[1] On the other

[1] In a period of declining agricultural values, farm lands offer a particular difficulty, yet the need for finance is pressing. The Agricultural Credits Act, 1928, (18 & 19 Geo. V, c. 43) has attempted to solve these difficulties. The provisions of this statute are too technical for treatment in an elementary textbook, but we may notice its main features. Part I provides for the establishment of an agricultural mortgage loan company, called the Agricultural Mortgage Corporation, in which the shares are held by a number of the big banks. Its loans are, in the first instance, supported by a guarantee from public funds. Two types of loan are contemplated by the statute. (*a*) Long term loans secured on farm lands and buildings, whether for ordinary agricultural purposes or for land improvement under the Land Improvement Acts, 1864 and 1899.

hand, high-class stock and shares are easily realisable and form a good subject for mortgages. In view of the fact that mortgage transactions are invariably handled by the banks' legal advisers and involve very difficult technical questions, it is proposed to deal with the matter here only in outline, and, unless it appears otherwise, the law will be stated as it exists at present; for while the banks' legal advisers must be conversant with the pre-1926 law, it would only confuse the elementary student of general banking law to have to master two systems.[1]

Most kinds of property can be made available as security by means of mortgage, such as land, goods stock, and shares. In principle, these are all governed by the same general considerations, but actually they are effected by different methods, and the legal rules applicable vary from one type to another. In the first part of this chapter we shall be chiefly concerned with land; a separate section will be given to stocks and shares.

A high authority[2] has stated that "there is a considerable difficulty in framing any definition of a mortgage which would be intelligible to beginners." The typical form of mortgage which prevailed until the Law of Property Act, 1925, was a transfer (technically

Apart from state assistance to the lending corporations, the statute does not affect the ordinary law of mortgages. (*b*) Short term loans secured on farm stock, i.e. crops, live stock, farm implements, etc. Ordinarily, such goods could only be mortgaged by means of bills of sale which would have to be publicly registered. The statute introduces two new types of charge, a fixed charge and a floating charge (ss. 6 and 7). They are exempted from stamp duty, but must be registered in the Land Registry (see s. 9)—it is, however, a criminal offence to publish their existence to the world (s. 10). A floating charge under the Act operates in the same way as one created by a company under the Companies Acts; it has certain priorities over other charges both on land and stock (see s. 8 (3) (6) ). Under either type of charge full liberty of disposition of stock is retained to the farmer (ss. 6 & 7), but he is under the obligation to pay the proceeds to the mortgagee (*Ibid.*).

[1] The student would be well advised to consult the relevant chapters in Topham's *New Law of Property*, and to read Jones' *Bankers and the Property Statutes of 1925 and 1926*.

[2] Elphinstone's *Introduction to Conveyancing*, 7th Ed., p. 130.

called a conveyance) of property by a borrower (the mortgagor) to his creditor (the mortgagee) subject to a proviso that it should be re-conveyed to the borrower (mortgagor) if he repaid his debt with the agreed interest upon the stipulated date. According to the letter of the law if he failed to pay, the property passed finally into the ownership of the creditor (mortgagee). From early times, however, the Court of Chancery, which exercised an equitable jurisdiction, laid it down that even if the mortgagor did not make his repayment punctually he might still at a later date "redeem" his property on payment of the sum due to the mortgagee by way of principal, interest, and costs. This right to redeem is called "the equity of redemption," and it was decreed that the mortgagor could not, at the time of entering into his mortgage, bargain away the equity of redemption, the maxim being "once a mortgage always a mortgage."

## ENFORCING THE SECURITY

Foreclosure

If the mortgagee decides to enforce his security, (i) he must bring proceedings at law to obtain a decree of foreclosure, and, when this is made, the property becomes his absolutely, the equity of redemption being then lost. Bankers seldom have recourse to foreclosure as landowning is not their function.

Sale

(ii) Alternatively the mortgagee has the right to sell the property. This was formerly provided for in the mortgage deed, but now exists by virtue of the Law of Property Act, 1925.[1] The statutory right of sale arises on the mortgagor's default to repay the principal on the day fixed by the mortgage, but the Act gives him a substantial period of grace[2] before the mortgagee can exercise this power. Nevertheless the form of mortgage used by the banks usually provides that the right to exercise the power of sale shall arise as soon as the customer has failed to accede to a demand for repayment. If, on sale, a sum is obtained which

[1] S. 101 (1) (i).
[2] See s. 103.

after paying all the costs is larger than the amount of the loan and interest, the mortgagee is trustee of the balance for the mortgagor or for later mortgagees if any such there be. The method of sale is naturally that usually followed, as it enables the banker to recoup his advance, and does not saddle him with any responsibility in regard to the management of the property.

Taking possession

(iii) It is possible for the mortgagee to make his security effective without having recourse to foreclosure or sale. He may, as soon as the mortgage is executed, take possession of the property and recoup himself as far as possible out of the rents and profits,[1] or (iv) alternatively he may appoint a receiver of the rents and profits of the property without himself entering into possession.[2] The former method is seldom used by banks for the same reason as they do not foreclose and also because the mortgagee in possession is strictly accountable to the mortgagor for his stewardship. The appointment of a receiver, which can only take place when the right of sale has become exerciseable, may often be necessary because the existence of some interest in the property which cannot be got rid of may prevent an advantageous sale from being made. A good example of this occurs when a mortgaged house is let to a tenant on a long lease. Here a receiver will probably have to be appointed. He will collect the rents, and out of these expenses the current interest will be paid, and the surplus, if any, will be used in reduction of the capital amount of the debt.[3]

Receivership

Finally it need hardly be mentioned that the customer can be sued for the debt, but this is, of course, quite independent of the realisation of the security.

## EQUITABLE MORTGAGES

Equitable mortgages

Thus far we have been considering a formal legal mortgage. Suppose the borrower agreed in return for a loan to execute a mortgage of certain property of his and having received the money refused to carry out

[1] Law of Property Act, 1925, s. 95 (4).
[2] *Ibid.*, s. 101 (1) (iii). [3] *Ibid.*, s. 109 (8).

his undertaking. At common law the lender's only remedy was an action for damages for breach of contract, which would offer no better security than an action on the debt itself. Equity, however, treats "that which ought to be done as done" and the Court of Chancery therefore in such a case would hold that the property in question had become mortgaged, and thereby conveyed to the lender, subject always to the mortgagor's equity of redemption. A mortgage of this kind is called an "equitable mortgage" because it is enforceable only in equity and not at common law. In such a case the lender does not obtain a legal estate, only a right to enforce his security in equity—the loan is regarded as if it were "charged" on the property and equitable mortgages were therefore often called charges. At first sight such an expedient seems a simple and desirable method of avoiding the formality and expense of a deed of mortgage. Actually, however, its value in the form suggested would depend on the good faith of the borrower, and lenders cannot usually be expected to rely upon this. For example, should the borrower in order to secure a further loan execute a legal mortgage on the same property to some other lender who was ignorant of what had gone before, the first lender's rights in the property would become subordinated to those of the second lender, for "where the equities are equal the law prevails." Thus if A agrees to mortgage property worth £900 to B in return for a loan of £600, and afterwards grants a legal mortgage to C for the same amount, C may be entitled to be recouped £600 out of the property first, leaving only £300 for B. As will be shown later,[1] however, there are ways and means of making equitable mortgages which are safe enough to make this type of security commonly acceptable. Even so, it has further disadvantages because no statutory right of sale, or to enter into possession, or to appoint a receiver, exists.[2]

[1] See p. 272, *post*.

[2] S. 101 of the Law of Property Act, 1925, establishes the right of sale, etc., only in cases of mortgages by deed.

If the mortgagee desires to sell or to appoint a receiver, he must apply to the Court. This difficulty may be got over by express provisions in the instrument and by the borrower appointing a nominee of the lender, e.g. the manager of the branch of the bank, his attorney to sell and execute a conveyance of the property on his behalf.

## TITLE

Investigation of title

The principal drawback of the legal mortgage lies in the necessity of investigating title, at any rate in the case of land and buildings. Just as a man cannot sell more than he has (*nemo dat quod non habet*), so also he cannot effectively mortgage property to which he has no or a defective title. The fact that he is in possession or has the title deeds does not mean that his title is not defective. A person proposing to advance money upon mortgage must, therefore, through his legal advisers conduct an elaborate investigation into the borrower's title to the property proposed to be mortgaged, on even stricter lines than he would do if he were buying instead of taking a mortgage. During such an investigation it may well be found that all sorts of independent parties have interests of one kind or another in the property which seriously diminish the value of the borrower's interest in it, and may make it inadvisable to accept it as security. In particular, other lenders may already have made advances on the security of the same property, for the impecunious borrower tries every method of raising money. The question of which lender is to have the prior claim depends on various matters to be considered later. If through an oversight some such interest is overlooked and the full sum asked for by the borrower is advanced, the lender may afterwards find that he is not fully secured.

Registration of title to land

The recognition of such multiplicity of interests in land makes for uncertainty of title and for increased costs in the transfer of land. The elaborate legislation of 1925 has done something to improve the situation. Obviously, if there were a public official register of

owners and of all subsidiary interests existing in third parties, the position would be much easier. A voluntary system of registration has existed since 1875,[1] but has not until recently been much used owing to expense. Compulsory registration has been much advocated, and, although the difficulties are great, a beginning has been made in the counties of London and Middlesex, and at Hastings and Eastbourne. The Registers at the Land Registry are (i) registers of the actual land identifiable by plan and map, (ii) registers of the owners of such land, and (iii) registers of the mortgages and other charges created over such land. When the owner's title has once been investigated and the official in charge of the register is satisfied that it has been made out, the title will be registered and on future sales or mortgages no further investigation beyond an inspection of the registers is necessary. The legal estate in registered land can only be transferred by registered transfer, and only legal estates can be entered on the register. All equitable interests are called "minor interests," and unless they appear on the register of charges do not affect a *bona fide* purchaser or mortgagee of the property. A certificate called a "land certificate" is issued by the registrar to the owner: it contains an exact copy of the relevant entries in the property and ownership registers.

Three different types of title may be registered—

(*a*) *Absolute*. This means that the registered owner's right to the freehold has been satisfactorily established. In the case of leases the lessee's interest may be registered as a good leasehold title, that is to say, his title to the lease is good, but the landlord's interest has not been investigated. (*b*) *Qualified*. This means that some defect in the title has appeared during the investigation. What this is will appear on the register. (*c*) *Possessory*. This means that the person registered is in possession of the land or in receipt of the rents and profits. If the registrar on completing his inquiries is satisfied that the title is absolute, he may register

[1] Land Transfer Act, 1875 (38 & 39 Vict. c. 87).

it as such notwithstanding objection by the proprietor.[1] Application may be made for registration of either an absolute or a possessory title. In the latter case, the lender need only investigate it down to the date of first registration, as from that time only transactions appearing on the register will bind him.

It is clear therefore that there is not much danger from the point of view of title in advancing money on registered land, provided that proper searches are made in the registers. The area of land covered by the registers is, however, at present small, though it may well be extended in the near future.[2]

Registers of Encumbrances

In making his investigations in the case of unregistered land, the lender may derive considerable assistance from a number of Registers of Encumbrances upon land which exist. These are as follows[3]—

(*a*) *The Register of Pending Actions.* On this register actions claiming the land and bankruptcy petitions against the owner are registered.

(*b*) *The Register of Land Charges.* This is a very important register from the point of view of mortgagees because on it should appear charges of very varying kinds, such as those imposed under statutes, e.g. mortgages and equitable charges not protected by the deposit with the mortgagee of the title deeds to the property; restrictive covenants and equitable easements; and annuities charged against the land.

(*c*) *The Register of Annuities.* This exists only in respect of annuities which became charged on the land before 1926.

(*d*) *The Register of Writs and Orders.* On these must be registered judgments affecting the land in question and "writs of elegit" issued in respect thereof,[4] and receiving orders in bankruptcy.

[1] Land Registration Act, 1925, s. 4 (*b*).

[2] As from 1st January, 1936, new areas may be brought in by Order in Council.

[3] These are described as they exist under the Land Charges Act of 1925. See ss. 1 to 10 inclusive.

[4] A writ of elegit is the method of executing a judgment decreeing that the plaintiff is the owner of the land. It is an order to the sheriff to put him in possession of it.

(*e*) The register of deeds of arrangement.

(*f*) The register of charges effected by a company registered under the Companies Act, 1929.[1]

Among the charges by a company which must be registered are those "on any land wherever situate or any interest therein." This is particularly important for banks, many of whose most important borrowers are limited companies.

Local authorities (e.g. district and borough councils) should keep registers of charges which they may acquire under the Public Health Acts and similar statutes (usually for work done on the land by the authority the expense of which is charged to the owner but which he has failed to pay). Such charges are void against a purchaser for value unless registered, so that it is often advisable to search this register.

**Effect of non-registration**

The effect of non-registration is not the same in all cases, but, broadly speaking, it means that the interest of the person failing to register will be postponed to those of a person *bona fide* claiming an interest by virtue of a later transaction.

**Registers of deeds**

In two counties, Middlesex and Yorkshire, it has long been compulsory to register all deeds and other documents affecting the legal estate in land. The effect of non-registration is to enable a person subsequently acquiring an interest to take a good title provided he has registered the instrument conferring it upon him and has acted honestly.[2]

These registers of deeds and the other registers mentioned render considerable assistance in the investigation of title but they do not enable it to be dispensed with. Registers of documents are very different from registers of title. There is clearly some overlapping between the general registers of encumbrances and the county registers of deeds, and in some cases it is provided that registration in the county register is sufficient.[3] Moreover where registration of title is

[1] See s. 79.
[2] The precise effect differs in Yorkshire and Middlesex.
[3] Here again the position differs in Middlesex and Yorkshire.

made compulsory there ceases to be any point in keeping a separate register of deeds relating to the land, and the Middlesex Deeds Registry has accordingly been closed except for the registration of deeds executed before registration of title became compulsory.[1]

All mortgages of chattel property ("bills of sale") have to be registered within seven days of execution, a copy has to be filed, and the execution and attestation of the instrument have to be verified by affidavit or the instrument is void in respect of the chattels comprised therein. Ships technically are chattels but the formalities in respect of these are somewhat different though here too registration is required—failure however, is less serious, as priorities only are affected, not the validity of the mortgage instrument.[2] **Bills of sale**

## EFFECTING THE MORTGAGE

The methods of effecting mortgages are varied, depending on the kind of property in question, and on whether a legal or equitable mortgage is desired. Chattel property (goods) must be mortgaged by means of a bill of sale, which must be in the form prescribed by the Bills of Sale Acts, 1882, or it will be void, and must be attested by a credible witness who is not a party to the instrument. The body of law relating to such bills of sale, which depends on two statutes[3] and numerous cases, is considerable and difficult. This is a form of security most commonly taken by moneylenders and given by persons who are quite impecunious; it is not favoured by banks. It may, however, be necessary occasionally for a banker to take a bill of sale, e.g. on the mortgage of a factory the trade machinery, though it be attached to the building, will usually be chattel property. In such cases, however, security will usually be taken by means of a debenture under which a charge will be taken on the machinery.[4] Documents **Methods of effecting mortgages** Goods

[1] Land Registration Act, 1936 (26 Geo. V. & 1 Edw. VIII c. 26, s 2). Searches can still be made.

[2] Merchant Shipping Act, 1894 s. 33.

[3] The Bills of Sale Acts, 1878 and 1882 (41 & 42 Vict., c. 31 and 45 & 46 Vict., c. 43).

[4] See p. 278, *post*.

of title to goods, however, such as bills of lading are often made the subject of equitable charges, or obligations in the nature of trusts, sometimes called hypothecations, which are given or undertaken by customers in connection with the issue of bankers' credits.[1] Ships also may furnish adequate security. Here legal mortgages are governed by the Merchant Shipping Act, 1894,[2] and may take one or other of two forms.[3]

Ships

The usual legal mortgage of a ship or share therein is effected by mortgage in the form given in Schedule (1) of the Merchant Shipping Act, 1894. There are in fact two forms, one to be used in the case of a lump sum advance and the other to secure a current account. The mortgage when executed should be registered in a special registry kept for the purpose, and obtaining priority over other non-registered encumbrances as from the time of registration. Only those mortgages which are in the prescribed form, or as near as may be, will be accepted for registration. An unregistered mortgage, however, is not invalid but will be postponed to all those which are registered, even though the registered mortgagee was aware of the prior encumbrance.[4] It follows that cautious lenders will be content with nothing less than registered mortgages.

The other method of mortgage is by issue by the registrar of a certificate of mortgage. It is only made use of when the ship is at a distance, and is really a device based on the use of a power of attorney for connecting up the register with the distant lender. Bankers will seldom need to make use of this method.

In the case of registered mortgages upon ships, there is a statutory power of sale. Alternatively the mortgagee may take possession and recoup himself out of the profits of running the vessel.

Land and buildings

The methods of effecting legal mortgages of immoveable property were completely altered by the Law of Property Act, 1925.[5] The mortgagee no longer becomes

[1] See p. 211, *ante*. [2] See ss. 31–37, 39–43.
[3] On the subject, see Maclachlan, *Treatise on the Law of Merchant Shipping*, 7th Ed., Ch. 1.
[4] *Black* v. *Williams*, [1895] 1 Ch. 408. [5] See s. 85.

the full owner (i.e. he does not take the estate in fee simple, which remains in the mortgagor) but he gets a sufficient legal estate to give him all the security necessary. The Act establishes two types of legal mortgage of freeholds: (1) the long lease (three thousand years) subject to a proviso for its cesser on repayment, and (2) the legal charge made by deed. A charge on land formerly established an equitable interest but now —provided it is made by deed, and expressed to be made by way of legal mortgage—it has exactly the same effect as the mortgage made by granting a long term of years. The second method is perhaps to be preferred as being the simpler and is in practice made use of by the banks. In either case if the mortgagee realises his security by foreclosure or sale, the mortgagor loses his fee simple which becomes vested in the mortgagee or in the purchaser as the case may be.

Whichever method be adopted, however, it is essential that the mortgagee should obtain *possession of the title deeds* to the property, or if there is difficulty about this register his mortgage. A person finding the owner of property in possession of his title deeds is entitled to infer that the property is unencumbered by mortgages, charges, etc., and it is the policy of the law to protect him against such prior encumbrances. It appears therefore that if the mortgagee fails to obtain deposit of the title deeds a later mortgagee who does so will be preferred to him, but the first mortgagee can protect himself by registration.[1] If a legal mortgagee is unable to obtain the title deeds, he should register his mortgage under the Land Charges Act, 1925.[2] A legal mortgagee not protected by deposit of the title deeds to the legal estate is called a puisne mortgagee; second mortgages (as to which, see below page 270) are usually puisne mortgages.

[1] It is considered, however, by some authorities that if there is some good reason why the mortgagee did not get possession of the deeds, this is not so. See Topham, *New Law of Property*, 7th Ed., p. 310. This was certainly so before 1926; see *Grierson* v. *National Provincial Bank*, [1913] 2 Ch. 18.

[2] See *supra*, p. 265.

Mortgage of leases

A mortgage of a leasehold interest in land may take the form of a charge by way of legal mortgage or alternatively the leaseholder may sublet his interest for a term shorter than the period of the original lease (usually one day).[1]

Second and later mortgages

Borrowers frequently attempt to raise more than one loan upon the same property. If the property is valuable and prior charges are small, there is no reason why further loans should not be granted. Under the old law, second and subsequent mortgagees could only take an equitable interest. Under the Law of Property Act, 1925, such mortgages of land may be made so as to pass a legal interest. This is done by the grant of a lease longer in time (usually by one day) than the period of the lease granted by the earlier mortgage, and, of course, subject to the like proviso for redemption. Such a mortgage should be protected by registration, as the title deeds will not normally be available for deposit with the second mortgagee.

The principal danger to a second mortgagee lies in the possibility of "*tacking*" by the first mortgagee. Tacking arises in this way: Suppose Smith raises £500 by mortgage to Jones of his house worth £1000. Later he raises £300 from Brown by second mortgage. Afterwards he obtains a further £300 from Jones on the security of a further mortgage without disclosing to the latter the existence of Brown's mortgage. Under the pre-1926 law, Jones could add or "tack" his second mortgage to his first and obtain security for £800 in priority to Brown, provided he was unaware of the latter's interest when he made the second advance, while a third or subsequent mortgagee could obtain priority over earlier mortgagees by obtaining the legal estate, i.e. by buying out the first mortgagee, provided always that at the time when he made his advance he was unaware of the earlier mortgages.

The Law of Property Act, 1925,[2] abolishes tacking in respect of post-1925 mortgages, except in three

[1] See Law of Property Act, 1925, s. 86.
[2] See s. 94, as amended by the Law of Property Act, 1926, s. 7.

cases, all of which concern further advances by the first mortgagee, i.e. it is no longer possible for a third or subsequent mortgagee to tack. The three cases in point are (*a*) when the subsequent mortgagee agrees to it; (*b*) when the mortgage deed contains a covenant by the mortgagee to make further advances; (*c*) when at the time of his subsequent advance the mortgagee had no notice of the existence of earlier advances secured on the same property. The registration of such an earlier charge amounts to notice of it.

Head (*b*) implies a substantial extension of the right to tack, for where the original mortgage deed contains such a covenant further advances can safely be made by the mortgagee notwithstanding he knows of intervening charges. The position where further advances are contemplated without being obligatory is also provided for, since it would be a hardship if a search had to be made every time a cheque drawn on an account in debit was honoured. Accordingly, when the mortgage is made expressly for securing a current account or other further advances, the registration of a prior mortgage will not be such a notice as prevents tacking provided there is no registration at the time when the original mortgage is created or when the last search is made, whichever last happens. If the bank receives actual notice of a second mortgage, however, it will make further advances at its own risk, and without acquiring the right to tack.[1]

Head (*c*), on the other hand, curtails the privilege of tacking since it is no longer necessary that there should be actual knowledge of the intervening encumbrances to prevent the right to tack from arising: it is sufficient that there should be notice. A lender who does not make proper investigations before tacking his later charges, and in particular who does not inform himself of the registration of an intervening encumbrance attaching to the property, is taken to have such notice.

A lender can only therefore safely advance on second

[1] Law of Property Act, 1925, s. 94 (2).

mortgage (*a*) if he ascertains that the first mortgagee is not bound to make further advances and (*b*) if he registers his charge immediately.

**Equitable mortgage**

The usual method of effecting an equitable mortgage is to deposit the title deeds of the property with the lender together with a memorandum of deposit. Sometimes the borrower gives a written undertaking to execute a legal mortgage in favour of the lender if called upon to do so, and this is commonly done when a bank is the mortgagee. An equitable mortgage by deposit of title deeds was always a fairly safe form of mortgage,[1] and now will generally take priority over any subsequent mortgage or charge, whether legal or equitable, and also over any prior mortgage which is not registered. An equitable mortgage or charge, protected by registration but not by deposit of title deeds, ranks according to the date of registration and therefore provides a security to all intents as good as that afforded by a legal mortgage.[2] From a practical point of view, however, the legal mortgage is to be preferred since it is more easily realised.

Equitable mortgages can be executed by any valid agreement to that effect or sometimes even by conduct. They can usually be protected as "general equitable charges" by registration under the Land Charges Act, 1925, as already noted. They rank in order of registration and provided satisfactory inquiries are made as to the title deeds they appear to furnish adequate protection.

[1] *Grierson* v. *National Provincial Bank*, *supra*, was an important exceptional case. There the owner of property raised money on it by deposit of title deeds with a bank. Afterwards he made a legal mortgage to the plaintiff subject to the bank's interest. Still later he redeemed his deeds by paying off his debt to the bank and subsequently obtained a loan from the defendants by deposit of the title deeds. The plaintiff had never informed the bank of his interest, so that they had naturally surrendered the deeds without informing him. The question then arose as to who should have priority, the legal mortgagee (plaintiff) or the equitable mortgagee (defendant) who had the deeds. It was held that there was no obligation on the plaintiff to inform the first bank of his mortgage, and that nothing had happened to displace the rule that the legal mortgagee is entitled to priority.

[2] The mortgage by deposit is expressly safeguarded by s. 2 (3) of the Act.

The value of a security may of course depreciate, and lenders protect themselves against this by advancing not more than a certain proportion of the estimated value at the time of the loan, usually two-thirds. This is intended chiefly as a safeguard against market fluctuations. It is obvious, however, that in the case of many types of property, and especially buildings, a much heavier depreciation may take place through lack of proper repairs. It is clearly to the mortgagor's advantage to keep the property in repair, but he is under no obligation to do so, and it is therefore the practice to require him to covenant by one of the terms of the mortgage deed to keep the property in good repair. Even more important is it that the property should be properly insured against fire; otherwise the security may be lost altogether. A further covenant by the mortgagor is to keep the property insured up to an amount stipulated, and if he fails to do so the mortgagee has the right to insure it at his expense.

**Common form in bank mortgages**

**Repairs**

**Insurance**

By another common form clause a bank mortgagee reserves the right to *consolidate* mortgages. By consolidation is meant the adding together of mortgages on different properties held by one mortgagee—it is to be distinguished from tacking. Suppose the bank advance £2000 to Jones on his house and £3000 on his factory: they may, if they have reserved the right to do so, consolidate the two mortgages and treat them as a mortgage for £5000 on the two properties; i.e. Jones cannot redeem his house without at the same time redeeming his factory. If, as may possibly have happened, the factory has seriously depreciated in value, this right will be important to the bank. The right to consolidate mortgages only exists when expressly bargained for in one or other of the relevant deeds of mortgage.[1]

**Consolidation**

Of the various other clauses commonly found in the deeds of mortgage and agreements to charge or deposit used by bankers, some have already been referred to, as that conferring the right of sale without complying

[1] Law of Property Act, 1925, s. 93.

with statutory formalities and that appointing the nominee of the banker the mortgagor's attorney to effect sales, etc., used in the case of equitable mortgages; others though of considerable practical importance are of a somewhat technical character and cannot receive consideration in such an outline discussion of the subject as is being attempted here.

## Stocks and Shares and Life Policies

A mortgage of stocks and shares or of a policy of life assurance is usually referred to as a charge. Generally speaking, it is governed by the same sort of considerations, and effected by similar means as a mortgage of land was before 1926 although being choses in action these types of property differ considerably from the tangible property with which we have so far been dealing. They are also not affected by the Law of Property Act, 1925. In view of these facts and of their importance to bankers, it is considered advisable to treat them separately.

Stock or shares in a company governed by the Companies Act, 1929, may be made the subject of either a legal or equitable mortgage.[1] A legal mortgage involves the actual transfer of the stock or shares in question, and must in almost all cases be completed by the registration of the title with the company.[2]

Apart from the fluctuating value of stocks and shares which afford a commercial weakness in this type of mortgage, the only legal danger appears to be in the possibility of the customer having furnished forged transfers and certificates to his banker. The latter will usually have sent these in for registration himself, and by doing so he warrants that they are genuine.[3] Should the company thereafter issue new certificates

[1] We have not space to deal with companies apart from the Act, e.g. chartered companies, though the position is substantially the same.

[2] This is common form under the Articles of companies. "A present and unconditional right to have a transfer registered" is said to be the equivalent of a transfer for this purpose. See Hart, *op. cit.*, Vol. II, p. 966; but Paget doubts this, *op. cit.*, p. 353.

[3] *Sheffield Corporation* v. *Barclay*, [1905] A.C. 392 digested below.

to the mortgagee or to his nominee, they will become estopped from challenging their title in these new certificates. The company, however, remains liable to the original owner whose certificates were counterfeited and for this liability they are entitled to be indemnified in an action for breach of warranty brought against the bank which presented them for registration.

**ILLUSTRATION. SHEFFIELD CORPORATION *v*. BARCLAY**[1]

The defendant banker had received a transfer which purported to be executed by the registered holders of certain stock; actually it had been forged. This he sent to the corporation with the request that they should register the stock in his name. The request was carried out, and the stock afterwards transferred to a third party who was registered as owner. The forgery was then discovered, and the plaintiff had to provide the third party with new stock. They sued the bank for the cost of this and were held entitled to recover.

In the case of the legal mortgage this difficulty could be avoided by requiring the mortgagor himself to carry out all the formalities in connection with the transfer. It need hardly be added that a legal mortgagee is bound by any prior interests of which he has notice.

Full legal mortgages are, however, uncommon except where the loan is likely to be long standing, the usual method being that of equitable mortgage effected by the deposit of the stock or share certificate with the lender accompanied by what is called a blank transfer, i.e. a form of transfer signed by the assignor leaving the name of the assignee to be filled in by the lender should it become necessary for him to realise the security. Occasionally the articles require that the transfer must be by deed, in which case the blank transfer will be insufficient and a power of attorney must be obtained. This is, however, uncommon in the case of companies registered under the Companies Act, 1929.

The security may be realised by sale or by foreclosure. On realisation the bank will fill in the blank transfer and send it forward with the certificate for

[1] [1905] A.C. 392.

registration. Here they run the risk of the transfer having been forged, a matter which has already been discussed. In this case, however, it might not be possible to get the mortgagor to take responsibility for registration.

Like any equitable mortgagee, the banker will be postponed to a legal mortgagee who obtains a title without notice of prior claims. The fact that registration is almost always necessary to complete title, however, may be made to furnish him with adequate protection. Notice in lieu of distringas of the equitable interest can be given to the company in question, which will thereupon come under the obligation to notify the banker of any proposed transfer, and on receipt of such notice the latter can if necessary take action to prevent its going forward.

Such a notice, however, requires an affidavit and authentication under the Seal of the Court. Notice by letter is not necessarily effective because in the first place many companies exempt themselves in their articles from the obligation to take notice of "equitable, contingent future or partial interests" and the validity of such clauses even when the company itself afterwards claims a lien on the shares in question has frequently been upheld.[1] Apart from such an exemption clause it has been claimed that the general words of Sect. 101 of the Companies Act, 1929 (by which, "no notice of any trust expressed implied or constructive shall be entered on the register and be receivable by the registrar in the case of companies registered in England or Ireland"), confer a like benefit upon every company. In *Bradford Banking Company* v. *Briggs*,[2] the House of Lords held that these words did not cover notice of a mortgage but in that case the company was claiming to exercise a lien in its own interest, and, in Hart's view, the position would be different if the interests of a third party were involved.[3]

[1] See *Société Générale de Paris* v. *Walker* (1885), 11 App. Cas. 20.
[2] (1886), 12 App. Cas. 29.
[3] Hart, *Op. cit.*, Vol. II, p. 986.

We are unable to concur with this opinion, but until the point is finally decided the notice in lieu of distringas will be necessary for full protection, for it would not appear to be overruled either by exemption clause or Sect. 101.

The possibility that the company may claim a lien on the mortgaged shares in respect of some liability towards it of the shareholder is a risk which is taken equally by legal and equitable mortgagees. Such a lien only exists when expressly provided in the company's articles, but since a clause to that effect is common form, the possibility must always be borne in mind. The likelihood of its being exercised is a matter of practical judgment.[1]

In the same way, policies of life assurance may be used as security by the method of mortgage, and again the mortgage may be legal or equitable. A legal assignment is effected by deed which in addition to the proviso for redemption usually contains the following stipulations— Life policies

(*a*) a covenant for payment of premiums or to keep up the policy;

(*b*) a licence to the lender to pay the premiums upon the debtor's default and to add them to the capital amount of the loan;

(*c*) a licence to the lender to surrender the policy.

Notice of assignment must be given to the assurer in accordance with the Policies of Assurance Act, 1867. Payments made to the assured or his representative in good faith when no notice has been received will be valid to discharge the policy.

An equitable mortgage is effected by deposit of the policy with or without an undertaking to execute a deed of assignment and accompanied by an agreement containing the clauses already mentioned. It is advisable to give notice of such charge to the assurer, but this will not give the security priority over earlier

[1] It may be assumed in the case of fully paid shares on the official Stock Exchange list that there is no lien, owing to the incidence of the Rules of the Stock Exchange.

equitable mortgages,[1] though it might assist in preventing a later legal mortgage. A mere agreement to assign would amount to an equitable mortgage, but a banker should be satisfied with nothing less than possession of the policy.

Policies of life assurance are usually regarded by bankers and others as a very good type of security. From the legal point of view, this opinion cannot be endorsed. They should be used as a collateral security in conjunction with others. The surrender value is often comparatively small, and in the absence of reinforcement by other security it is not safe to lend beyond this sum. Difficulties over payment of premiums often arise. Moreover policies of assurance are apt to be defeated for a variety of reasons, such as failure by the assured to disclose material facts, fraud, lack of assurable interest, suicide of the assured, etc. The conditions of the policies in common use vary considerably. "Indisputable policies" which in addition contain clauses safeguarding the position on the suicide of the assured should be looked for, but only a close study of the policy offered and some knowledge of the law of life assurance can enable the lender to form a sound judgment.

## DEBENTURES

Debentures

Debenture is the name given to the document by which a limited company acknowledges receipt of money which it promises to repay with interest at a future date (usually fixed) and mortgages or charges its assets as security for its borrowings. The word, however, is not strictly a technical term of law but is used with various meanings.[2] The ordinary form of debenture, however, is issued by a company and differs from other mortgages in that it creates a general charge over all the assets of the company. The

[1] See *Spencer* v. *Clarke* (1878), 9 Ch.D. 137.

[2] See Palmer's *Company Law*, 17th Ed., p. 300, where seven differing types of instrument correctly described as debentures are enumerated.

**ILLUSTRATION. GENERAL EXCHANGE BANK v. HORNER**[1]

One, L, negotiated the amalgamation of the plaintiff bank with another bank. He made a private bargain with the general manager of the latter bank, under which the latter was to receive a substantial payment nominally as compensation for loss of his position. In the liquidation of the plaintiff bank, the liquidator claimed against the manager (the defendant) that he must repay the amount so received from L.

*Held:* That the defendant was liable to make good the sums received less the amount properly payable as compensation.

The terms of the manager's employment as regards such matters as salary, length of notice on dismissal, ansfer from one branch to another, etc., are usually governed by express contract as are those of other servants of the bank.

Disputed points between the bank and its servants will usually therefore fall to be dealt with by reference to the terms of such contracts, and will involve difficulties of interpretation rather than of substantive law. The comparative absence of decided cases on this subject may perhaps be taken as an indication that the contracts are usually well drawn and that the relations between the parties are good.

The most important questions which arise from time to time under this head are probably those relating to dismissal. The length of the notice required to terminate the contract will invariably be provided in the contract so that the difficult question of determining what is a reasonable period of notice which has to be solved when there is no agreement on the point will not arise. In addition to any grounds for dismissal which the bank may reserve to itself by the terms of the contract, the general common law grounds on which a master may dismiss a servant without notice must be borne in mind though these may also be expressly mentioned in the contract. The most important of these are serious misconduct, and incompetence. The question of what misconduct is serious

[1] (1870), L.R 9 Eq. 480.

may be difficult but it may be taken as axiomatic that a high standard of conduct is to be expected of bank officers[1] The perpetration of a criminal offence is clearly such misconduct Fraud, or any conduct amounting to deliberate bad faith not only towards the bank but towards a customer, would constitute a sufficient ground for summary dismissal, since a bank official's position is one of particular trust and responsibility Refusal to obey orders, except when unlawful and in other rare instances, is misconduct.

#### ILLUSTRATIONS. BOUZOUROU *v* OTTOMAN BANK,[2] OTTOMAN BANK *v* CHAKARIAN

The appellant in the first case, a Christian Turkish subject employed by the respondent bank at Stamboul, was transferred to a distant branch in Asia Minor He refused to go on the ground *inter alia* that the branch was in a zone dangerous to Christians in the then troubled times He was summarily dismissed, and it was held that his employers were entitled to take this course since it was found on the facts that there was no imminent danger of violence

The respondent in the second case was an Armenian Turkish subject in the employ of the appellants bank, and was transferred to Constantinople He went, but shortly afterwards asked for a transfer on the grounds that his life was in danger When this was refused, he fled and was thereupon summarily dismissed for misconduct In an action for wrongful dismissal, it was found that his life had really been endangered and that his dismissal was accordingly unjustified[3]

Prolonged illness or illness intermittent in character but which in substance deprives the bank from obtaining the benefit from the contract to which it is entitled will justify dismissal[4] General incompetence for his work or habitual or serious neglect,[5] are good grounds for summary dismissal. But isolated instances of neglect or incompetence, though, as has been already stated,

[1] As to misconduct see *Clouston & Co Ltd* v *Corry* [1906] A C 122

[2] [1930] A C 271 and 277

[3] These dismissals were actually defended as a "faute grave" under the contract of employment, but there would appear to be no difference between this and the Common Law rule

[4] Cf *Storey* v *Fulham Steel Works Co* (1907) 24 T L R 89

[5] Cf *Cuckson* v *Stones* (1859), 1 E & E 248

they may give the master a right of action for damages will only justify dismissal when of such a serious nature as to amount to misconduct.

Other servants

The other servants employed by bankers are cashiers and clerks.[1] The cashier has the duty of receiving money on the bank's behalf and of paying it away against the customers' mandates His position is, therefore, one of responsibility since his employers will usually be liable for any mistakes which involve the customers in loss Clerks on the other hand, according to the usual conception of that word, perform subordinate functions of a varying nature which do not call for description

The question of when a bank is liable for the acts of its cashiers and clerks and what is the legal relationship between them and the bank depends on exactly the same type of consideration as has already been shortly summarised in connection with the position of the manager and does not require further treatment

[1] Technically managers other than managing directors and cashiers are also simply clerks see *R* v *Greenland* (1867), L R 1 C C R 659

# APPENDIX I

## STAMP LAW[1]

### I. Introductory

Stamp Acts are revenue acts: that is to say, they are a method of raising revenue by requiring that legal documents shall bear a revenue stamp. This is a very old method of taxation and in many ways an unsatisfactory one, for its incidence is uneven and it taxes the transaction rather than the profits of it. We are here, however, concerned with the law as it is.

It is obvious that taxation of this kind will lead to widespread evasion unless stringent precautions are taken to prevent it. The three methods which have been adopted by the legislature are those of the fine, the penalty,[2] and the invalidation of the document in question.

A fine is a sum of money ordered to be paid by a criminal or *quasi* criminal court in punishment of an offence.[3] The fine for the unauthorised issue of an unstamped bank note, for example, is fifty pounds,[4] and for issuing an unstamped bill of exchange or promissory note is ten pounds. Fines are not imposed in all cases of infringement, e.g. in cases of documents relating to conveyances of land, or in most cases where a fixed duty of sixpence is payable.[5]

A penalty is a sum of money which must be paid in order to get stamped a document, which has been

[1] This appendix is intended only as an introduction to the subject, not as a detailed guide. For the latter purpose, recourse must be had to treatises on the Stamp Acts.

[2] The words fine and penalty are confused with each other in the Stamp Act; the two matters are, however, really quite distinct.

[3] Fines under the Stamp Act, however, are only recoverable in the High Court (see s. 121).

[4] Stamp Act, 1891, s. 31, a provision now obsolete in England.

[5] Note, however, that the issue of an unstamped bill of lading is punishable with a fine of fifty pounds (s. 40 (2)).

issued without a stamp, and is for that reason legally ineffective. Most instruments can be stamped in this way on payment of the duty which should have been paid originally and a penalty of ten pounds. In certain cases, however, the defect is incurable: this is, e.g. generally speaking true of those bills of exchange or promissory notes which ought to be issued on paper bearing an impressed stamp.[1]

Failure to stamp does not, strictly speaking, invalidate the document. An unstamped or improperly stamped document cannot be used in connection with legal proceedings, but is not otherwise bad. In those cases where a party must produce an original document in Court in order to win his case, he must make sure that it is properly stamped or he will fail. The Stamp Acts, however, hit documents not transactions, and if it be possible to prove the case without production of the document in question, the party may do so. This will frequently not be possible, however. As has already been noticed, a party may often get over the difficulty by paying a penalty, but in other cases if the document is not stamped at the time of execution or issue the defect cannot be rectified.

Several transactions in one

In spite of these various deterrents, a good deal of deliberate evasion of the stamp laws takes place, while there are numerous offenders through ignorance. The use of post-dated cheques is a well-known method of evading the requirement of an *ad valorem* stamp on a bill of exchange.[2] The Stamp Act makes no real attempt to prevent this. Another method which was tried and countered by the authorities was that of carrying out several transactions on one document only, stamping it in respect of one, or alternatively carrying through one transaction by means of several documents so that a smaller amount might be payable.[3]

Evasion

It is always lawful for a person so to arrange his affairs as to avoid the payment of revenue dues such

[1] See Stamp Act, 1891, s. 37 (2).
[2] See pp. 44, *et seq.*, *ante*.
[3] See Stamp Act, 1891, s. 4.

as stamp duties provided he does not infringe the words of the statute, for as has been said above the Act is aimed at documents not at transactions. Thus it is often possible to use cheques (properly dated not post-dated) which only require twopenny stamps instead of bills of exchange drawn payable at future dates which need *ad valorem* stamps provided there is an arrangement that the cheques shall not be presented for payment until a certain future date. The Stamp Act itself, however, prevents the use of one stamped document for carrying out a number of different transactions unless separately stamped for each transaction.[1]

Method of stamping

There are two methods of stamping an instrument, that of the impressed stamp and that of the adhesive stamp. Impressed stamps can naturally only be supplied by the authorities. Certain instruments, such as bills of exchange and cheques are commonly drawn on paper already stamped which can be obtained for the purpose: others such as deeds of conveyance are drawn up and executed, and then left with the authorities for stamping. The method of the impressed stamp is clearly advantageous to the State, and many documents are required to be stamped in this way, e.g. assignments of life policies, conveyances and mortgages, inland bills of exchange and promissory notes (except for cheques and other bills payable on demand or not exceeding three days after date or sight) and transfers of stocks and shares. On the other hand, the use of an impressed stamp is often more or less impracticable from a business point of view, and in these cases the parties are given the option of using an adhesive stamp, e.g. the ordinary agreement under hand, bills of lading and charter parties, cheques and bills of exchange payable as above, and receipts for money. Foreign bills of exchange and promissory notes will naturally not be drawn on English impressed forms and must be stamped with adhesive stamps.[2] An

[1] See s 4.
[2] Stamp Act, 1891, ss. 34, 35

adhesive stamp must be effectually cancelled and made incapable of being used for any other instrument or any postal purpose.[1]

Exemptions

It has been judged politic to free certain types of documents from the stamp laws altogether. The most important of these are agreements relating to the sale of goods, agreements for the employment of clerks and servants, agreements for the hire of labour. Again there is a long list[2] of instruments which would for the purposes of the Act come within the definition of a bill of exchange and which are expressly exempted from duty.[3]

Adjudication

If there is doubt as to whether an instrument requires a stamp, or as to the amount, the solicitor to the Inland Revenue Department will adjudicate upon the question, subject to appeal to the High Court. The adjudication will be noted upon the stamp and is conclusive.

It is clear from what has just been said that the question of proper stamping is of very great importance to all persons taking legal or equitable interests in documents of title or negotiable securities, or indeed accustomed to rely for their rights upon any sorts of documents or memoranda which require to be stamped. And of none is this more true than of the banker who deals in the course of his business with an astonishing variety of documents and instruments of one kind or another. We propose therefore to consider shortly some of the more important types of document which bankers commonly handle.

## II. Negotiable Securities and Documents Treated as Such

Negotiable securities for this purpose are of two types, negotiable instruments proper and negotiable instruments which are also marketable securities.

The Stamp Act, 1891, deals specifically with two types of negotiable instruments, viz. bills of exchange

[1] Stamp Act, 1891, s. 8 (1).
[2] See *ibid.*, First Schedule.
[3] See next section.

and promissory notes. The expression bill of exchange, however, as used in this Act is given an entirely different meaning from that which it has under ordinary law and extends to cover numerous instruments which could not ordinarily be regarded as bills at all, and are clearly not negotiable instruments. It is therefore necessary to observe the wording of the relevant section.[1]

"For the purposes of this Act the expression 'bill of exchange' includes draft, order, cheque, and letter of credit, and any document or writing (except a banknote) entitling or purporting to entitle any person, whether named therein or not, to payment by any other person of, or to draw upon any other person for, any sum of money; and the expression 'bill of exchange' payable on demand includes (*a*) an order for the payment of any sum of money by a bill of exchange or promissory note, or for the delivery of any bill of exchange or promissory note in satisfaction of any sum of money, or for the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen"; and also (*b*) orders for payment at stated intervals, and orders lodged with the person who is to make the payment and not with the person to whom it is to be made.[2]

It will be observed that this covers not only bills of exchange, including cheques, and promissory notes, but also the various types of conditional order which have been discussed in Chapter IV, above, assignments of debts if drawn in a certain form and other conceivable types of document.[3] Promissory notes payable out of a particular fund, or on an indefinite condition or contingency are included.[4]

A receipt is not *prima facie* within this definition,

[1] Stamp Act, 1891, s. 32.
[2] See p. 326, *post*.
[3] A transfer order by a bank on the Bank of England was held to be included in *Committee of London Clearing Bankers* v. *Inland Revenue Commissioners*, [1896] 1 Q.B. 222 and 542.
[4] See s. 33 (2).

but receipts for two pounds and upwards require to be stamped with a twopenny stamp under Sect. 101 of the Stamp Act, 1891, and Sect. 34 of the Finance Act, 1920. A receipt, however, which either directly or by implication orders payment of a sum of money is a bill of exchange payable on demand for the purposes of the Stamp Act.[1]

The documents falling to be treated in this section are of two types; those requiring twopenny stamps and those requiring *ad valorem* stamps.

The twopenny category consists essentially of bills of exchange coming within the wide definition already referred to and which are payable on demand, i.e. on demand or at sight or on presentation (or within the period of grace of three days after date or sight).[2] The *ad valorem* category can again be divided into two. The first consists of all other such bills of exchange (the normal case being that of the commercial bill drawn payable at a stated period after sight) and of promissory notes of all kinds except bank notes. It will be observed that a promissory note payable on demand would fall in the second category. The instruments in this class, however, must have been drawn, or expressed to be payable, or actually paid or endorsed or in some manner negotiated in the United Kingdom.[3] The scale of duties may be conveniently set out here as it is very short. Amount of stamp

| | *s.* | *d.* |
|---|---|---|
| £10 and under | | 2 |
| Over £10 and up to £25 | | 3 |
| Over £25 and up to £50 | | 6 |
| Over £50 and up to £75 | | 9 |
| Over £75 and up to £100 | 1 | 0 |
| For every additional £100 or fraction thereof | 1 | 0 |

[1] See *Midland Bank* v. *Inland Revenue* (1927), 43 T.L.R. 754, described at p. 47, *ante*. According to Mr. G. H Fender, in his valuable *The Stamp Laws in Relation to Bankers*, this is only so as long as the draft bears the issuers' signature. It will be observed that the words of the section quoted above are not restricted to signed documents, and it may be questioned whether Mr. Fender's view is correct.

[2] Finance Act, 1918, s. 36. These include cheques and conditional orders.

[3] *Ibid.*, s. 36 (2).

It will be noticed that the category of bills hit by the section is wider than that of inland bills.[1] But a bill which is both drawn and expressed to be payable outside the United Kingdom escapes with a smaller duty, viz. 6d. per £100 or fraction thereof.[2]

There is no such reduction in the case of promissory notes.

The second section of the *ad valorem* category consists of those negotiable instruments which are classed as marketable securities, i.e. bearer debentures and bonds, bearer scrip, bearer stock, and share warrants, and bearer coupons attached to bonds. The duty payable varies from one type of instrument to another and also according to whether the security is issued by foreign or colonial governments or by companies formed or established out of the United Kingdom. For details, recourse must be had to the Finance Act, 1899, Sect. 4, and the Finance Act, 1920, Sect. 38. Generally speaking, the rate on British or foreign securities is 4s. per £10 or fraction thereof, but colonial government and municipal issues receive preferential treatment; also bearer securities of foreign companies other than share warrants or stock certificates. When the amount secured is to be paid off within one year, the duty is reduced to 6d. per £10, or if within three years to 1s. per £10. In the case of share warrants and stock certificates issued under the Companies Act, 1929, the duty is three times the amount which is chargeable when the shares or stock are transferred by deed.[3] Scrip certificates which may be in a negotiable form[4] require a twopenny stamp only.[5]

It may happen that an instrument falls into both sections of the second category, e.g. it may be at once a promissory note and a negotiable security. It should

[1] For definition of inland bills see Bills of Exchange Act, 1882, s 4

[2] Finance Act, 1899, s 10 (1)

[3] Companies Act, 1929, s 108, Stamp Act 1891, Sched I: Finance Act, 1920, s 38

[4] Cf. *Rumball* v *Metropolitan Bank* (1877), 2 Q B D 194

[5] Finance Act 1920, s 35

then be stamped with the duty for marketable securities which is the higher.[1]

Exemptions

There is also a large and important number of exemptions under both categories, covering more particularly cheques, bills, warrants and drafts drawn by government departments or institutions of a national character such as local authorities, registered friendly societies, etc., and instruments used by bankers for internal operations such as clearing accounts.[2] An important instance is a letter of credit issued for use abroad—it issued for use at home it must be stamped like a bill

The twopenny stamp duty may be paid by means either of an impressed or adhesive stamp [3] In the case of *ad valorem* stamps they must be impressed, except in the case of foreign instruments, which are to be denoted by adhesive stamps [4] This is clearly a necessity of commerce In any case, where an adhesive stamp is permissible, however, the Revenue Authorities are concerned to see that it is cancelled at the time of use in order that it may not be removed or used again It must always therefore be cancelled by the person who affixes it—in the case of cheques and similar instruments by the drawer before he delivers it out of his hands, custody or power [5] The person to whom a cheque or other instrument in that category is presented for payment unstamped, e g a banker, may stamp it with a twopenny adhesive stamp but must at the same time cancel it.[6] The banker is naturally entitled to debit his customer with the amount of such stamps An intermediate holder cannot properly stamp such an instrument [7]

In cases where the Act requires an impressed stamp,

[1] See *Speyer Bros* v *Inland Revenue*, [1908] A C 92
[2] See Alpe's *Stamp Laws*, 22nd Ed for a detailed list of these, and Stamp Act, 1891, Schedule I
[3] Stamp Act, 1891, s 34 (1)
[4] *Ibid*, s 34 (2)
[5] *Ibid*, s 34 (1)
[6] *Ibid*, s 34 (2)
[7] See *Hobbs* v *Cathie* (1890) 6 T L R. 292 and Chapter V above as to post-dated cheques

the instrument cannot be stamped after execution, even on payment of a penalty.[1] There is an exception to this, however, in the case of bills presented for acceptance or accepted or payable outside the United Kingdom which may be received by British Courts provided the proper duty and any penalty are paid.[2]

### III. Mortgages and Charges

In connection with the stamping of mortgages, the following are the chief points which require notice: (*a*) the difference between legal and equitable mortgages; (*b*) the method of computing the duty; (*c*) the position where collateral security is given; (*d*) the use of denoting stamps where there are two or more instruments used for providing security for one or for connected advances; (*e*) the difference between limited and unlimited advances; the position on transfer of the mortgage; (*f*) the position on reconveyance of the property; (*g*) the effect of failure to stamp.

(*a*) For purposes of stamping the difference between legal and equitable mortgages is based on different considerations from those which prevail in the general law. In this connection an equitable mortgage is an agreement or memorandum under hand only (i.e. not sealed), relating to the deposit of any title deeds or instruments constituting or being evidence of the title to any property except stock or marketable securities or creating a charge on such property.[3] Any other type of mortgage has to be treated as a legal mortgage, a category which is therefore wider than that which exists normally. The duty upon an equitable mortgage is much lower than that on legal mortgages, being 1s. per £100 or fraction thereof as opposed to 2s. 6d.[4] Appreciable savings on stamp duties can therefore be effected by making use of equitable mortgages.

[1] Stamp Act, 1891, s. 37 (2).
[2] Finance Act, 1933, s. 42.
[3] Stamp Act, 1891, s. 86 (2).
[4] *N.B.* Up to £300 there is a scale of duties on legal mortgages advancing by stages £10, £25, £50, £100, £150, etc., though the rate is still based on 2s. 6d. per £100.

The case of stock and marketable securities requires further discussion. The term marketable security means a security of such a description as to be capable of being sold in a stock market,[1] and therefore includes stock. These securities are either negotiable or non-negotiable. The former class has already been dealt with.[2] The latter are of three main types: debentures, stocks, and shares. The term debenture is not capable of rigid definition but usually denotes a mortgage or charge of or over a limited company's assets. The debenture instrument must be stamped like any other legal mortgage; the certificates issued to the various holders of debenture stock need not be stamped.

When stock or marketable securities are transferred by way of sale or gift, the transfer must be stamped in the ordinary case with an *ad valorem* stamp amounting to 1s. for every £5. We have already seen that a bank taking such securities to support a loan may often wish to register its title with the company in question.[3] The payment of such *ad valorem* duty would be a considerable hindrance to such transactions. Actually, however, there are a number of cases where a fixed duty of 10s. may be paid, one of which is a "transfer by way of security for a loan."[4] The Inland Revenue Department have advised company registrars that they may accept certificates from well-known banks that a particular transfer lodged for registration comes within this section and is properly stamped.

The memorandum of charge under which the relevant stock or share certificates and the blank transfer (if any) are lodged with the bank is not treated as a mortgage instrument and requires therefore only a sixpenny stamp. Should it for any reason require to be sealed the position is different and the full 2s. 6d. duty must be paid.

(*b*) The duty is naturally computed not on the value

[1] See Stamp Act, 1891, s. 122.
[2] See p. 329, *ante*.
[3] See p. 276, *ante*.
[4] See s. 74 of the Finance (1909–10) Act, 1910.

of the property mortgaged but on the amount of the loan or advance secured.

(*c*) The amount of a loan or overdraft may be increased from time to time. In this event the security originally given may be insufficient to cover the new advance, in which event it will be necessary for the banker to obtain collateral security. When this is done, the collateral security need only be stamped 6d. per £100 or fractional part thereof. This rate also applies to substituted security.[1] Moreover, the maximum duty in such cases is 10s. Naturally duty has to be paid at the full rate upon the additional advance but this is charged upon the original mortgage instrument even if it exceeds the value thereof.

### ILLUSTRATION

On an advance of £500 secured by mortgage of property worth £1000 the stamp will be 12s 6d Suppose that a further £1000 be advanced, and deeds deposited by way of collateral security to a value of £800. The original mortgage must be stamped with an additional 25s., and the memorandum of deposit must be stamped 7s. 6d , because the collateral security is in respect of £1500, not only of £1000.

In the illustration just given, it will be observed that the collateral security is given by way of equitable mortgage, but it must be stamped on the basis of being a collateral, not on the basis of being an equitable security.

(*d*) When there are two or more instruments executed for the purpose of securing one loan, and in such a way that one is collateral to another, as in the case just illustrated, it is advisable and indeed necessary that the fact that the substantial portion of the duty has been paid in the main instrument shall be indicated on the subsidiary one.[2] This is effected by what is called a "denoting stamp." The stamp affixed to documents on which duty is paid is coloured red. The stamp affixed to a subsidiary instrument to denote the

[1] The section includes "auxiliary and additional" security which appear in practice to be much the same as collateral security

[2] Stamp Act, 1891, s 11

amount of duty which has been paid upon the main instrument is coloured blue.

(*e*) The ordinary bank mortgage is unlimited, that is it is given to secure not only the advance actually made but other advances which may be made from time to time.[1] Further stamps may accordingly be added from time to time in the manner indicated in the illustration to paragraph (*c*) above. Sometimes, however, the mortgage is limited to securing a specific sum: when a third party provides the security, he may insist on this. In such a case an agreement to lend a further sum against the mortgage of the same property amounts to a new transaction, and therefore requires a new memorandum of charge which must be stamped on the value of the new loan

Should the security on the original mortgage be as much as the banker thinks it can safely carry, he will require collateral In this event the collateral charge will be stamped as a primary security for the additional sum, and if it is unlimited in amount it would also appear necessary that it should be stamped as collateral though there appears to be a divergence in the practice in this regard [2]

(*f*) Documents by means of which securities are reconveyed, released, discharged, or surrendered require to be stamped at the rate of 6d. per £100 or fraction thereof. Under the Law of Property Act, 1925, Sect. 115, a simple method is provided of reconveying the property by statutory receipt It would seem that such a receipt must be stamped as a reconveyance rather than as a mere receipt. A mere receipt for repayment of the sum lent would require only a twopenny stamp, and this is said to be the case when such a receipt is endorsed upon a memorandum of equitable mortgage or charge though its effect in equity is to discharge the security.[3]

(*g*) The period within which the documents under

[1] See Chapter XI, p 271, *ante*
[2] See Fender, *op cit*, pp 92–3
[3] *Ibid*, p 96.

discussion in this section should be stamped is thirty days from execution. After that they can usually be stamped on payment of duty, plus a penalty.

## IV. Miscellaneous

There are a very large number of legal documents which, without having any particular importance to or connection with banking, will nevertheless pass through the hands of bankers from time to time such as deeds of conveyance, settlements, insurance policies, partnership articles, etc. Any attempt to discuss the stamping of these is clearly outside the scope of a work such as the present. The following instruments, however, call for consideration as they are in some cases peculiarly the concern of bankers, and in others of great importance to them.

*Instructions or Mandates to Bankers.* A letter or other written instruction from a customer to his banker requiring him to take certain action, usually relating to the account, does not, normally speaking, require a stamp, e.g. an order to transfer funds from one account to another provided that the accounts are those of the same customer, or to credit certain sums to a particular account, or to make a purchase on the customers behalf of stock or shares. When, however, the instruction relates to the payment or transfer of money to a third party it is treated as if it were a bill of exchange. We have already noticed that orders for periodical payments at stated intervals and for payment of a sum of money at a date after that of the instrument only require a twopenny stamp, when the order is lodged with the person who is to make the payment, i.e. they are treated as if they were payable on demand.[1] A bill of exchange payable by instalments at a future date does not fall into this category. Sect. 38 (2) would appear to give the banker on whom such orders are drawn the power to stamp them if they come to him unstamped, since, for the purposes of the Stamp Act, 1891, they are bills of

[1] Stamp Act, 1891, s 32 (*b*) and see p. 318, *ante*.

exchange payable on demand. In the case of orders for periodical payment, it would appear to be immaterial whether they are lodged by the drawer or by the party claiming to receive payment, but when the order is for one payment at a future date it will require *ad valorem* stamping if sent to the payee, for it then amounts to an ordinary bill payable at a future date. An authorisation by, e.g. a local authority to a banker to pay drafts issued by the treasurer falls under this head and requires a twopenny stamp in respect of each payee's name appearing on the instruction; but an order by a customer to his banker to make a number of payments to various named persons apparently requires only one such stamp, however many names may appear upon it. An instruction to transfer a sum from the customer's account to that of another person also needs a twopenny stamp.

*Powers of Attorney.* A power of attorney is an instrument under which one person is appointed the attorney of another, and given certain powers, defined in the instrument, to act on his behalf. It is always executed under seal and when an agent will have to enter into contracts under seal it is necessary that he himself shall have been appointed by a similar instrument, i.e. by power of attorney. Many of the activities carried on by bankers as agents of their customers do not require authorisation in this way, e.g. the collection of cheques, or the receipt of securities from a third party. Sometimes, however, a power of attorney will be called for; it must then be stamped 10s.

*Guarantees and Indemnities.* These though different in legal theory are in much the same position as regards stamping. If contained in a writing not under seal, they are stampable like ordinary contracts in writing, i.e. 6d.: if under seal the duty is 2s. 6d. per £100. As with other deeds, the period for stamping is thirty days. Documents under hand, however, must be stamped within fourteen days. If an indemnity under seal does not specify the amount payable the duty is 10s.

*Receipts.* We have already seen that receipts given on payment of money amounting to £2 or upwards require a twopenny stamp.[1] There are, however, a number of exceptional cases where receipts are exempted from stamp duty. In particular, the following exemptions more closely concern bankers—

Exemptions

(*a*) A receipt given for "money deposited in any bank or with any banker to be accounted for and expressed to be received of the person to whom the same is to be accounted for."[2]

It is because of this exemption that the banker does not have to give a stamped receipt to his customer every time he receives moneys from him to the credit of the account. But when somebody other than the customer pays in the money he is entitled to have a receipt, and any credit slip handed to such third party must be stamped. If the acknowledgment contains no reference to a sum of money, it does not amount to a receipt, and does not need a stamp. A customer, when withdrawing money, does not give a receipt but if for any reason he does a stamp will be necessary.

(*b*) An acknowledgment by a banker of the receipt of a bill of exchange or promissory note for the purpose of being presented for acceptance or payment.[3]

(*c*) Receipts given when money is paid to the government, e.g. taxes, receipts given to government departments, and many kinds of public officers and institutions, such as clerks to the magistrates, County Court registrars and others.[4] This may be important in cases of orders in the form of cheques with receipts attached.

(*d*) Receipts given in respect of salary, pay, or wages.[5]

(*e*) Receipts endorsed on, written on or contained in any instrument liable to stamp duty and duly stamped acknowledging the receipt of the money therein expressed.[6]

[1] Stamp Act, 1891, S. 101 and Schedule, and Finance Act, 1920, S. 34.
[2] Stamp Act, 1891, Sched. 1.
[3] *Ibid.*
[4] *Ibid.*
[5] *Ibid.*
[6] *Ibid.*

*Scrip.* Scrip and scrip certificates to bearer are by usage negotiable instruments and as we have seen[1] fall under the marketable securities category of that class.

Scrip

The non-negotiable form of scrip requires a twopenny stamp which must be impressed.[2] Share certificates, however, do not require stamping.

[1] P. 320, *ante*.
[2] Stamp Act, 1891, Sched. I, and Finance Act, 1920, s. 35.

# APPENDIX II

## FORMS AND PRECEDENTS

### BANK GUARANTEE APPLICABLE TO AN INDIVIDUAL GUARANTOR

..................... ..........1 *April*.......... ........19. .

GENTLEMEN,—

In consideration of the Bank (which expression shall include their successors and assigns) opening and con tinuing an account with ....... .......*John Doe, Green Meadow Farm, Upper Highfield, in the County of Wessex*....... (hereinafter called the Principal), or continuing the existing account with the Principal, for so long as the Bank may think fit, or otherwise giving credit or accommodation or granting time to the Principal, either alone or jointly with any other person or persons, I hereby guarantee, on demand in writing being made to me, the due payment of all advances, liabilities, bills and promissory notes, whether made, incurred, or discounted before or after the date hereof, to or for the Principal, either alone or jointly with any other person or persons, and also of all bills, promissory notes, or guarantees held by the Bank bearing his signature, together with interest, commission, and other Banking charges including legal charges and expenses. And I expressly agree that the Bank shall have full discretionary power, without any further consent from me, and without in any way affecting my liability under this guarantee, to renew any advance, and to hold over, renew, or give up, in whole or in part, and from time to time any bills, notes, mortgages, charges, liens, or other securities received or to be received from the Principal, either alone or jointly with any other person or persons, or from any other person or persons, or bearing the name of the Principal, and without my assent in any way to grant time or indulgence to, or compound with the Principal or any person or persons liable on any such bills, notes, mortgages, charges, liens or other securities, or any person liable jointly with or as surety, for the Principal, or any other person or persons. And I declare that I have not received any security from the Principal for the giving of this Guarantee, and I agree that I will not so long as any moneys remain owing by the Principal to the Bank take any security from the Principal in respect of any liability hereunder without first obtaining the Bank's written consent, and I agree that in the event of my taking any such security the amount for which I am to be liable under this Guarantee as hereinafter mentioned shall be increased by the amount of which the dividend payable by the Principal to you is thereby diminished. And I further agree that in respect of my liability hereunder the Bank shall have a lien on all securities belonging to me now or hereafter held by the Bank and on all moneys now or hereafter standing to my credit with the Bank on any current or any other account. And further, that this guarantee shall be

a continuing security to the Bank, and shall not be determined except at the expiration of three calendar months, written notice given to the Bank of my intention so to do, and in the event of my death the liability of my legal personal representatives and of my estate shall continue until the expiration of three calendar months' notice in writing given to the Bank of the intention of my executors or administrators to determine this guarantee. And this guarantee shall be applicable to the ultimate balance that may become due to the Bank from the Principal and until repayment of such balance the Bank shall be entitled to retain, realize or otherwise dispose of in such manner as the Bank may think fit any securities now or hereafter held by the Bank and without any liability to account to me for any proportion of such securities or of the proceeds thereof until the said ultimate balance shall have been satisfied, and, in the meantime, I will not take any steps to enforce any right or claim against the Principal in respect of any moneys paid by me to the Bank hereunder. And, further, that if the Bank should receive payments from the Principal, or any person or persons as aforesaid liable to the Bank, or from any security held by the Bank, or if the Principal, being an individual or individuals, or any person or persons as aforesaid liable to the Bank, shall become bankrupt or insolvent or enter into any arrangement or composition with his or their creditors, or being a Company shall go into liquidation, the Bank shall be at liberty without discharging my liability to make or assent to any compromises, compositions or arrangements, or to prove and to rank as creditors in respect of the general balance of the Bank's account, or any item or items thereof, and to receive dividends thereupon, and all such payments and dividends received shall be treated as payments in gross, and my liability shall extend to the ultimate balance after deducting such payments, other than payments made by any co-surety for the full sum hereby guaranteed, and to the entire exclusion and surrender of all my rights as surety in competition with the Bank, the statutes of bankruptcy or any rule of law or equity to the contrary notwithstanding. A demand in writing shall be deemed to have been duly given to me or my legal personal representatives by sending the same by post addressed to me at the address hereunder written and shall be effectual notwithstanding any change of residence or death and notwithstanding notice thereof to the Bank, and such demand shall be deemed to be received by me or my legal personal representatives 24 hours after the posting thereof, and shall be sufficient if signed by any officer of the Bank, and in proving such service it shall be sufficient to prove that the letter containing the demand was properly addressed and put into the Post Office.

In the event of this Guarantee being determined either by notice by me or my legal personal representatives, or by demand in writing by the Bank, it shall be lawful for the Bank to continue the account with the Principal, notwithstanding such determination, and the liability of myself or my estate for the amount due from the Principal at the date when the Guarantee is so determined shall remain, notwithstanding any subsequent payment into or out of the account by or on behalf of the Principal. Provided always that the amount for which I shall be liable under this Guarantee shall not exceed ...... *Two thousand pounds*

and interest on such amount or on such less sum as may be due, at the rate of Five per cent per annum from the date of the Principal's default until payment.

This Guarantee shall be additional to any other Guarantee for the Principal signed by me that the Bank may at any time hold.

I agree that a copy of the account of the Principal contained in the Bank's book of account (or of the account for the preceding six months if the account shall have extended beyond that period) signed by the Manager for the time being of the office at which such account shall be kept, or any officer of the Bank, shall be conclusive evidence against me of the amount for the time being due to the Bank from the Principal in any action or other proceeding brought against me upon this guarantee.

Should the Principal be a Limited Company, corporate or unincorporate body, committee, firm, partnership trustees, or debtors on a joint account, the provisions hereinbefore contained shall be construed and take effect where necessary as if words importing the singular number included also the plural number. This my Guarantee shall then remain effective notwithstanding any death, retirement, change, accession, or addition, as fully as if the person or persons constituting, or trading or acting as, such body, committee, firm, partnership, trustees, or debtors on joint account, at the date of the Principal's default or at any time previously, was or were the same as at the date hereof. And, further, the Bank may recover against me to the extent hereinbefore mentioned notwithstanding that any security given or to be given to the Bank may be void, defective, or informal, or notwithstanding that the Principal being a Limited Company, corporate or unincorporate body or committee, may have exceeded its borrowing powers or that the borrowing from the Bank may have been *ultra vires*.

I waive in the Bank's favour all or any of my rights against the Bank or the Principal so far as may be necessary to give effect to any of the provisions of this guarantee, and I agree that this Guarantee shall be enforceable notwithstanding any change in the name of the Bank, and that it shall enure for the benefit of any banking company with which the Bank may become amalgamated and to which the Bank shall assign it.

*Witness*...............*Richard Roe*..................................

*Address*...............*The Laurels*..................................
..................*Upper Highfield*........................
..........................*Wessex*...............................

*Signature*...................*William Bailey*..........................
*Address* ...................*Blackacre Farm*...........................
.........................*Upper Highfield*.......................
...............................*Wessex*................................

## CIRCULAR LETTER OF CREDIT

Not available after ........ 19 ..

No. ..........................

£ ..........................

Date .................. 19

Gentlemen—

We beg to introduce to you .................. to whom you will please furnish such funds as .................. may require up to the aggregate amount of .................. pounds sterling against .................. sight drafts on our Head Office, London, each draft to be plainly marked as drawn under this Letter of Credit, No. .......... and to be signed in accordance with .................. specimen signature, which you will find on our Letter of Indication of the same number to be produced herewith.

We engage that such drafts shall meet with due honour, if negotiated within .......... months from this date, and request you to buy them at the rate at which you purchase demand drafts on London.

The amount of each draft must be inscribed on the back of this letter. The letter itself must be cancelled, and attached to the final draft drawn.

We are, Gentlemen,

Your obedient servants,

To Messieurs the Bankers
mentioned in the Letter of Indication,
which must be produced herewith.

*N.B.* The bearer, for purposes of security, is requested to carry this Letter of Credit apart from the Letter of Indication.

## LETTER OF INDICATION

No. .          Date .................. 19

To Messieurs the Bankers
mentioned in this Letter of Indication.

Gentlemen,

This letter will be handed to you by .................. in whose favour we have issued our Letter of Credit, No. .................. recommending .................. to your kind attention, and referring you to specimen signature below.

Your obedient Servants,

Specimen Signature.

## APPLICATION FOR DOCUMENTARY CREDIT

To the ...............................19....
X Y Z BANK,
LONDON, E.C.3.

Sir,

$\frac{\text{I}}{\text{We}}$ request you to establish by[1] ........................................ a Credit with your Branch at ........................................................ to the extent of £............ say........................................ Pounds, authorizing the negotiation of the drafts of M ........................ $\frac{\text{myself}}{\text{ourselves}}$ at ................ days after sight payable in London, and in consideration of your so doing $\frac{\text{I}}{\text{we}}$ hereby engage to accept such drafts and to pay the same in London at maturity.

The drafts are to be secured by the hypothecation to the Bank of Bills of Lading purporting to represent........................................at its invoice value, inclusive of Freight and Charges, if any, but you are not to be responsible in the event of any misrepresentation as to the quantity, quality, or value thereof. The Marine & War Risk Insurance thereon, with ........ per cent added, is to be effected by........................................ or by the Bank, in case such insurance should not be arranged to its satisfaction, the cost of which $\frac{\text{I}}{\text{we}}$ engage to pay; and the amount insured is to be held available to the Bank until payment of the drafts.

You are not responsible for the terms, conditions or sufficiency in respect of the $\frac{\text{Policy}}{\text{Policies}}$ nor for the default of the insurers

The Bills of Lading must read that the goods are "on Board" or "Shipped," and show $\frac{\text{Freight prepaid}}{\text{Freight payable at Destination.}}$

In the event of $\frac{\text{my}}{\text{our}}$ failing either to accept or to pay any such draft and of the Bank selling the goods, which they are fully authorized to do, $\frac{\text{I}}{\text{we}}$ undertake to pay on demand the amount of any deficiency on such sale, together with all usual commission and charges and expenses incidental thereto or otherwise. And it is agreed that on due payment of any draft with the cost of insurance the relative documents are to be given up to $\frac{\text{me}}{\text{us.}}$

It is understood that the negotiation of the draft or drafts above referred to shall be optional on the part of your Branch.

The Credit is not to remain in force after the..............................19....

Your obedient servant,

[1] Mail or Cablegram.

## BANKERS' CONFIRMED DOCUMENTARY CREDIT

THE DEPOSIT BANK, LIMITED
LONDON, E.C.2

. .............................................. 193

Dear Sirs,

CONFIRMED CREDIT No .......... (which please quote).

We beg to inform you that we have received advice from .............................................. that they have opened with us a Confirmed Credit in favour of .............................................. by order and for account of .............................................. to the extent of £ .............. (say ..............................) valid until .............................. and available by your drafts on us at .............................................. accompanied by—

| | |
|---|---|
| Invoice | Weight Note |
| Consular Invoice | Certificate of Origin |
| Full set "shipped" Bills of Lading to "order" .......... | Insurance Policy or Certificate covering Marine and War Risks |

all relative to a shipment of

per S.S. from to

in .............. shipment(s), consigned to

.............. before ..............

All drafts drawn under this Credit must contain the clause, "Drawn under L/C No. .......... dated .............................. " and we hereby undertake to honour such drafts on presentation provided that they are drawn and presented in strict conformity with the terms of this Credit.

Yours faithfully,

Countersigned— Manager.

# TRUST RECEIPT

The Manager,

THE X Y Z BANK,

LONDON, E.C.3.

Dear Sir,

We hereby acknowledge receipt of your letter of ................................ ......................................................enclosing documents for goods, as specified below, for sale on your account, and we undertake to hold these goods, or the proceeds thereof if sold, under trust for you. The proceeds will be paid to you as and when received.

The goods are insured under our policies and we hereby recognize your lien on same to the extent of the market values.

Yours faithfully.

# FORM OF MEMORANDUM OF DEPOSIT OF TITLE DEEDS BY A COMPANY

## (UNDER HAND)

### TO THE X Y Z BANK, LIMITED

1. WE, Limited, hereby declare that we have deposited with you the documents mentioned in the Schedule hereto, for the purpose of securing the payment of the moneys hereinafter mentioned, and intended to be hereby secured, and we as beneficial owners charge in your favour all our present and future estate and interest, both legal and equitable in all the property to which the said documents or any of them relate, including all trade and other fixtures, which now are, or which at any time or times may be in, upon, or about the said property, or any part thereof, with the payment to you of all the said moneys.

2. The moneys intended to be hereby secured shall include all moneys which now are or which at any time or times hereafter may become due or owing, or may be accruing due to you from us, either alone or jointly with any other person or persons Company or Companies on any account or liability whatsoever, and whether in the character of principal debtor to you, or guarantor, or surety, or otherwise howsoever, and shall also include all commission and other charges and interest in account according to your course of business, interest being computed day by day at one per cent per annum above the Bank of England rate of the same day, but never below five per cent per annum, or at such other rate as may be specially agreed, and shall also include all costs, charges and expenses which you may pay or incur in stamping this or any other document deposited with you, or in perfecting this present security, or in enforcing or obtaining payment of the said moneys, or in paying any rent, rates, taxes, or other outgoings in respect of insuring, repairing, maintaining, or completing any buildings, or in managing or realizing any property to which any of the said deposited documents relate, and all other costs and expenses which may be incurred by you in respect of the premises, together with interest at the rate aforesaid on all sums so expended by you, from the date of their being expended until payment thereof. And we further agree that you may insure any buildings included in this security for any amount you may think necessary.

3. We hereby agree to pay off all such moneys, costs, charges and expenses, at such time as may be agreed upon with you, or if there shall be no such agreement, upon demand in writing addressed and sent to us at our address for the time being in your books.

4. We further agree that we and all other necessary parties (if any) will, on any demand for this purpose and at our own cost, execute and deliver to you, or to such person or persons as you or any one of your General Managers or Superintendents of Branches for the time being may appoint, such legal or other mortgage or mortgages of the premises hereby charged or any of them for further securing the payment of the said moneys and interest hereby secured, and also any memorial for registration thereof as you or such General Managers or

Superintendents of Branches may require, and that every such mortgage shall be prepared by your Solicitors at our expense, and shall contain all or any of the powers and remedies (with or without modification) conferred on Mortgagees by the Law of Property Act, 1925, and shall also contain such other covenants, powers, provisions and remedies, and be in such form as your Solicitors shall think proper, and shall, if you so require it, contain a provision that all or any of such powers, provisions and remedies may be exercised by you, notwithstanding that the moneys intended to be secured thereby, or any part thereof, may not be then actually due and payable but only accruing due.

Any demand to be made to us hereunder shall be sufficiently made, if made in writing and addressed and sent by post to us at our address for the time being in your books, and notwithstanding that you may have had notice of any disposition or other dealing by us of or with any of the premises hereby charged.

5. We declare that the said property and premises are free of all charges and incumbrances, saving only as may appear by the said documents, and we hereby agree not to create any further charge or incumbrance upon them, without your consent thereto in writing first obtained. We further declare that the documents mentioned in the Schedule are all the documents in our possession or control relating to the title to the property hereby charged.

6. It is hereby agreed that if we shall execute or create any further or subsequent mortgage charge or incumbrance over the property hereby charged or any part or parts thereof in favour of any other corporation, person or persons of which you get notice, either actual or constructive, you may on getting such notice forthwith open a new or separate account with us in your books and if you do not in fact open such new or separate account you shall nevertheless be deemed to have done so at the time when you received or were deemed to have received such notice (hereinafter called the time of notice) and as from and after the time of notice all payments in account made by us to you shall (notwithstanding any legal or equitable rule or presumption to the contrary) be placed or deemed to have been placed to the credit of the new or separate account so opened or deemed to have been opened as aforesaid and shall not go in reduction of the amount due by us to you at the time of notice. Provided Always that nothing in this clause contained shall prejudice the security which you otherwise would have had hereunder for the payment of the moneys, costs, charges and expenses hereinbefore referred to notwithstanding that the same may become due or owing or be incurred after the time of notice.

Dated the day of 19

Witness to the Signature of

..............................................

..............................................

..............................................

SIGNED for and on behalf of

Limited,

pursuant to a Resolution of the Board of Directors

dated the day of

19 .

.............................................. *Director*.

[THIS SCHEDULE TO BE SIGNED ON BEHALF OF THE COMPANY.]

THE SCHEDULE WITHIN REFERRED TO—

| Date of Deed | | | Parties to Deed | Description of Deed and Particulars of Property |
|---|---|---|---|---|
| Day | Month | Year | | |

# MEMORANDUM OF DEPOSIT OF TITLE DEEDS BY INDIVIDUALS

## INCLUDING POWER OF ATTORNEY (UNDER SEAL)

### TO THE X Y Z BANK, LIMITED

1. I/We, the undersigned, hereby declare that I/we have deposited with you the documents mentioned in the Schedule hereto, for the purpose of securing the payment of the moneys hereinafter mentioned, and intended to be hereby secured, and I/we and every one or more of us as beneficial owner(s), charge in your favour all my/our and each of our present and future estate and interest, both legal and equitable, in all the property to which the said documents or any of them relate, including all trade and other fixtures, which now are, or which at any time or times may be in, upon, or about the said property, or any part thereof, with the payment to you of all the said moneys.

2. The moneys intended to be hereby secured shall include all moneys which now are or which at any time or times hereafter may become due or owing, or may be accruing due to you from me/us or any one or more of us either alone or jointly with any other person or persons, Company or Companies, on any account or liability whatsoever (including any moneys owing from the survivor or survivors on any such joint account) and whether in the character of principal debtor to you, or guarantor, or surety, or otherwise howsoever, and shall also include all commission and other charges and interest in account, according to your course of business, interest being computed day by day at one per cent per annum above the Bank of England rate of the same day, but never below five per cent per annum, or at such other rate as may be specially agreed, and shall also include all costs, charges and expenses which you may pay or incur in stamping this or any other document deposited with you, or in perfecting this present security, or in enforcing or obtaining payment of the said moneys, or in paying any rent, rates, taxes, or other outgoings in respect of insuring, repairing, maintaining, or completing any buildings, or in managing, or realizing any property to which any of the said deposited documents relate, and all other costs and expenses which may be incurred by you in respect of the premises, together with interest at the rate aforesaid on all sums so expended by you, from the date of their being expended until payment thereof. And I/we further agree that you may insure any buildings included in this security for any amount you may think necessary. And I/we further agree that you shall have a lien on all securities belonging to me/us or any one or more of us now or hereafter held by you and on all moneys now

or hereafter standing to my/our credit or to the credit of any one or more of us with you on any current or any other account.

3. I/We hereby jointly and severally agree to pay off all such moneys, costs, charges, and expenses, at such time as may be agreed upon with you, or if there shall be no such agreement, upon demand in writing addressed and sent to me/us or my/our legal personal representatives (if any), at my/our address for the time being in your books.

4. I/We further agree that you may exercise all such powers and remedies as you would have had, or would hereafter have, if Section 93 of the Law of Property Act, 1925, had not been enacted, and also that you may exercise all powers and remedies conferred on mortgagees by the Law of Property Act, 1925, in manner as if Section 103 of that Statute had not been enacted, and you may exercise such powers and remedies, notwithstanding that the moneys intended to be secured hereby, or any of them, may not be then actually due and payable, but only accruing due, or that the liability hereunder may be future or contingent, and that I/we and all other necessary parties (if any) will, on any demand for this purpose, and at my/our cost, execute and deliver any deed or deeds which may be necessary or proper, in order to convey the legal estate in the property sold to the purchaser or purchasers thereof, or to re-assign or surrender to the mortgagor any property sub-mortgaged by me/us to you and to secure the due registration of any such conveyance, re-assignment or surrender, and I/we further agree that I/we and all other necessary parties (if any) will, on any demand for this purpose, and at my/our own cost execute and deliver to you, or to such person or persons as any one of your General Managers or Superintendents of Branches for the time being may appoint, such legal or other mortgage or mortgages of the premises hereby charged, or any of them, for further securing the payment of the said moneys and interest hereby secured, and also any memorial for registration thereof, as you or such General Managers or Superintendents of Branches may require, and that every such mortgage shall be prepared by your Solicitors at my/our expense, and shall contain such covenants, powers and provisions, and be in such form as your Solicitors shall think proper.

And I/we declare that during the continuance of the present security I/we will hold all my/our present and future estate and interest hereby charged in trust for you as such mortgagees thereof as aforesaid, and will convey the same as you shall direct, and I/we authorize you during the continuance of the present

security by deed to remove me/us or any other person or persons for the time being a trustee or trustees in respect of the trust hereinbefore declared, and to appoint yourselves or any person or persons to be a trustee or trustees of the said trust premises, and thereupon to make a declaration vesting all my/our said estate and interest in such new trustee or trustees.

And I/we and every one or more of us hereby irrevocably appoint any one of your General Managers or Superintendents of Branches for the time being, to be my/our and each of our attorney or attornies jointly and severally for me/us and every one or more of us and in my/our and each of our names and on my/our and each of our behalf, and as my/our and each of our act and deed, or otherwise, to sign, seal and deliver, and otherwise perfect any such deed or deeds, memorial or memorials, or other assurance or assurances, and to do every such act as may be required or deemed proper on any sale of any of the said premises or in giving any legal mortgage thereof, and in order to vest in any purchaser, the legal estate, or to vest in any mortgagee (including yourselves) a term of 3,000 years, and all or any estate and interest in the said premises, and also in my/our and each of our name(s) to grant any such lease or leases as mortgagors or mortgagees in possession are under Section 99 of the Law of Property Act, 1925, empowered to grant.

Any demand to be made to me/us hereunder shall be sufficiently made, if made in writing, and addressed and sent by post to me/us or any one of us or in case of death to my/our legal personal representatives (if any) at my/our address for the time being in your books, and notwithstanding that you may have had notice of any disposition or other dealing by me/us or any one or more of us or my/our legal personal representatives or the legal personal representatives of any of us of or with any of the premises hereby charged.

5 I/We declare that the said property and premises are free of all charges and incumbrances, saving only as may appear by the said documents, and I/we hereby agree not to create any further charge or incumbrance upon them, without your consent thereto in writing first obtained. I/We further declare that the documents mentioned in the Schedule are all the documents in my/our possession or control relating to the title to the property hereby charged.

6. It is hereby agreed that if I/we or any one or more of us shall execute or create any further or subsequent mortgage, charge, or incumbrance over the property hereby charged or any part or parts thereof in favour of any other corporation, person or persons of which you get notice, either actual or

constructive, you may on getting such notice, forthwith open a new or separate account with me/us in your books, and if you do not in fact open such new or separate account you shall nevertheless be deemed to have done so at the time when you received or were deemed to have received such notice (hereinafter called the time of notice) and as from and after the time of notice all payments in account made by me/us or any one or more of us to you shall (notwithstanding any legal or equitable rule or presumption to the contrary) be placed or deemed to have been placed to the credit of the new or separate account so opened or deemed to have been opened as aforesaid and shall not go in reduction of the amount due by me/us to you at the time of notice. Provided Always that nothing in this clause contained shall prejudice the security which you otherwise would have had hereunder for the payment of the moneys, costs, charges, and expenses hereinbefore referred to notwithstanding that the same may become due or owing to be incurred after the time of notice.

IN WITNESS whereof I/we have hereunto set my/our hand(s) and Seal(s) this

day of 19

[1]SIGNED, SEALED AND DELIVERED
By the said
in the presence of
and

(L S)

[1]SIGNED, SEALED AND DELIVERED
by the said
in the presence of
and

(L S)

[1] Each signature to be witnessed by two persons



24—(L.2445)

[This Schedule to be Signed by Depositor(s).]

THE SCHEDULE WITHIN REFERRED TO

| Date of Deed | | | Parties to Deed | Description of Deed and Particulars of Property |
|---|---|---|---|---|
| Day | Month | Year | | |
| | | | | |

# INDEX